

Article 61

Conservation of the living resources

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- 1. The coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.**
- 2. The coastal State, taking into account the best scientific evidence available to it, shall ensure through proper conservation and management measures that the maintenance of the living resources in the exclusive economic zone is not endangered by over-exploitation. As appropriate, the coastal State and competent international organizations, whether subregional, regional or global, shall cooperate to this end.**
- 3. Such measures shall also be designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.**
- 4. In taking such measures the coastal State shall take into consideration the effects on species associated with or dependent upon harvested species with a view to maintaining or restoring populations of such associated or dependent species above levels at which their reproduction may become seriously threatened.**
- 5. Available scientific information, catch and fishing effort statistics, and other data relevant to the conservation of fish stocks shall be contributed and exchanged on a regular basis through competent international organizations, whether subregional, regional or global, where appropriate and with participation by all States concerned, including States whose nationals are allowed to fish in the exclusive economic zone.**

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I. Purpose and Function

1 The establishment of the exclusive economic zone (EEZ) means that most of the world's fish stocks are now subject to the jurisdiction of coastal States. It is estimated that about 95% of the capture fisheries take place in waters within 200 nautical miles of the coast.¹ Whilst Art. 56 of the Convention confers sovereign rights to explore and exploit the living resources in the EEZ,² such rights also come with a responsibility to conserve and manage these resources. Indeed, one of the principal rationales for extending coastal State jurisdiction was to permit greater control of fisheries by coastal States. In the words of one proponent of the EEZ at UNCLOS III, 'only the coastal State was in a position to apply the necessary conservation measures and plan the development of ocean species'.³ This view was based on the assumption that the ability to fish would be effectively controlled and regulated by the coastal State so as to reduce over-capitalization of fishing fleets and therewith the potential for overfishing. Both of these objectives have been quite difficult to achieve in practice, however.⁴

2 The purpose of Art. 61 is to set out the basic obligations of a coastal State in relation to the conservation and management of living resources in the EEZ. It applies only to living resources and there is no equivalent provision for non-living resources, such as oil and gas.⁵ The term 'living resource' – which was conceived and has hitherto been applied in relation to fisheries – may be interpreted as including the later concept of biodiversity in accordance with the Convention on Biological Diversity (CBD),⁶ to which all States Parties to the 1982 Convention are also party,⁷ thus allowing a broader interpretation of the provision in relation to conservation, sustainable use and impacts on ecosystems within the EEZ.⁸ It remains subject to debate, however, whether such an

¹ See e.g. UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A/CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch. 17.70.

² For further information, see *Proelss on Art. 56 MN XX CROSS REF.*

³ Statement of Zuleta Torres (Colombia), Second Committee UNCLOS III, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29 (1974), OR II, 224, 225.

⁴ *Donna Christie*, The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone, in: Ellen Hey (ed.), *Developments in International Fisheries Law* (1999), 395, 396.

⁵ *David M. Ong*, Towards an International Law for the Conservation of Offshore Hydrocarbon Resources within the Continental Shelf?, in: David Freestone/Richard Barnes/David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 93, 96.

⁶ Art. 2 CBD defines biodiversity as 'the variability among living organisms from all sources including, inter alia, terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part; this includes diversity within species, between species and of ecosystems'.

⁷ *Yoshifumi Tanaka*, A Dual Approach to Ocean Governance (2008), 134. For further information, cf. Status of Multilateral Treaties Deposited with the Secretary General, available via: <http://treaties.un.org>.

⁸ *Patricia Birnie/Alan Boyle/Catherine Redgwell*, *International Law and the Environment* (3rd edn. 2009), 750: '[T]he CBD may have modified the fisheries provisions of UNCLOS' to the extent necessary to ensure that fishing activities do not cause or threaten serious damage to biodiversity in light of CBD Art. 22, while also acknowledging that certain concepts in the 1982 Convention can be 'readily interpreted to include measures aimed at the protection of marine biodiversity'.

evolutionary interpretation would also lead to the inclusion of marine genetic resources under Art. 61 and the applicability of the provisions on access to the surplus under Art. 62 to such resources.⁹

3 It should be noted that several key elements of Art. 61 can be found *verbatim* in Art. 119 UNCLOS, under the heading Conservation of the Living Resources of the High Seas, namely: the determination of the total allowable catch (TAC) on the basis of scientific evidence available; the designation of measures to maintain or restore populations of harvested species at levels that can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors including the special requirements of developing States; the need to take into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards; and the obligation to contribute to and exchange available scientific information on a regular basis through international organizations.¹⁰

4 Art. 61 is not a self-standing provision; it must be read in light of the other provisions in Part V of the Convention relating to the conservation and management of living resources, notably Arts. 62-73. In addition, it should be read in light of the general obligations concerning the protection of the marine environment, rare or fragile ecosystems and the habitat of depleted, threatened or endangered species (→ Art. 192; Art. 194; Art. 196).¹¹ International legal developments related to the precautionary and ecosystem approach, furthermore, warrant an evolutionary interpretation of Art. 61.¹²

II. Historical Background

5 A duty to conserve fish in coastal waters was arguably already in existence at the turn of the 20th century. In the *North Atlantic Coast Fisheries Case*, the arbitral tribunal held that ‘Great Britain, as the local sovereign, has the duty of preserving and protecting the fisheries. In so far as it is necessary for that purpose, Great Britain is not only entitled, but obliged to provide for the protection and preservation of the fisheries.’¹³

6 The 1958 Convention on Fishing and Conservation of the Living Resources of the High Seas (High Seas Fishing Convention) already contained certain provisions to which the origin of Art. 61 can be traced back. Although the High Seas Fishing Convention prohibited coastal States from taking enforcement action against foreign nationals fishing in the high seas adjacent to their territorial waters,¹⁴ it did recognize that coastal States have ‘a special interest’ in maintaining the productivity of high seas fisheries adjacent to their territorial sea.¹⁵ To balance these two approaches, the High Seas Fishing Convention established a ‘convoluted procedure’¹⁶ allowing unilateral conservation measures in these areas where agreement with third States could not be

⁹ *Charlotte Salpin*, The Law of the Sea: A Before and an After Nagoya?, in: Elisa Morgera/Matthias Buck/Elsa Tsioumani (eds.), *The 2010 Nagoya Protocol on Access and Benefit-sharing: Implications for International Law and Implementation Challenges* (2012), 149 *et seq.*

¹⁰ For further information, see *Rayfuse* on Art. 119.

¹¹ *Tanaka* (note 7), 134.

¹² On the precautionary and the ecosystem approach, see further *Czybulka* on Art. 192 and Art. 194.

¹³ PCA, *The North Atlantic Coast Fisheries Case* (Great Britain v. United States of America), Award of 7 September 1910, RIAA XI, 167

¹⁴ Art. 6 (4) High Seas Fishing Convention.

¹⁵ Art. 6 (1) High Seas Fishing Convention.

¹⁶ *Donald R. Rothwell/Tim Stephens*, *The International Law of the Sea* (2010), 296.

reached. Accordingly, such unilateral conservation measures would be valid for third States if: there was a need for urgent application of these measures in the light of the existing knowledge of the fishery; the measures adopted were based on appropriate scientific findings; and they did not discriminate in form or in fact against foreign fishermen.¹⁷ The unilateral measures would then be subject to endorsement or overruling by a special fisheries commission with binding decision-making powers.¹⁸

7 The duty of conservation was also recognized in the *Fisheries Jurisdiction Case* (UK v. Iceland) in 1974. Judge NAGENDRA SINGH, in his declaration in that case, noted that:

‘The law pertaining to fisheries must accept the primacy for the need of conservation based on scientific data. This aspect has been properly emphasized to the extent needed to establish that the exercise of preferential rights of the coastal State, as well as the historic rights of other States dependent on the same fishing grounds, have all to be subject to the over-riding consideration of proper conservation of the fishery resources for the benefit of all concerned. This conclusion would appear warranted if this vital source of man's nutrition is to be preserved and developed for the community.’¹⁹

8 It was on this basis that the ICJ ordered the parties to the dispute to negotiate an equitable solution to their differences, taking into account *inter alia* the ‘conservation and development of the fishery resources’ in question.²⁰ The judgment in the *Fisheries Jurisdiction Case* (UK v. Iceland) was rendered whilst negotiations at UNCLOS III were already underway, and the Court noted that ‘[t]he very fact of convening the third Conference on the Law of the Sea evidences a manifest desire on the part of all States to proceed to the codification of that law on a universal basis, including the question of fisheries and conservation of the living resources of the sea.’²¹ Indeed, the need for conservation had grown even greater over time as there was increasing evidence that many fish stocks were threatened by overfishing.²²

9 From the outset, the discussions at UNCLOS III concerning coastal State jurisdiction over fisheries assumed that such States must take measures to conserve and manage the fish stocks under their control. The crucial question concerned how much discretion the coastal State should have in deciding on appropriate conservation and management measures. On the one hand, some States proposed granting complete authority to the coastal State to decide such matters.²³ On the other hand, some States were of the opinion that international fishery organizations and other fishing States should also have a role in managing fish stocks in the EEZ.²⁴

¹⁷ Art. 7 High Seas Fishing Convention.

¹⁸ Art. 6 (5) and Arts. 9-11 High Seas Fishing Convention, as summarized by *Rothwell/Stephens* (note 16), 296.

¹⁹ ICJ, *Fisheries Jurisdiction Case* (United Kingdom of Great Britain and Northern Ireland v. Iceland), Merits, Judgment of 25 July 1974, Declaration by Nagendra Singh, ICJ Reports (1974), 3, 40.

²⁰ *Ibid.*, 34 (para. 79).

²¹ *Ibid.*, 23 (para. 53).

²² In 1987 it noted that ‘most major familiar fish stocks throughout the waters over continental shelves, which provide 95 per cent of the world’s fish catch, are now threatened’, Secretary General, Report of the World Commission on Environment and Development, UN Doc. A/42/427 (1987), Annex (Our Common Future).

²³ See e.g. Second Committee UNCLOS III, *Gambia et al.*: Draft Articles on the Exclusive Economic Zone, UN Doc. A/CONF.62/C.2/L.82 (1974), OR III, 240.

²⁴ See e.g. Second Committee UNCLOS III, *Bulgaria et al.*: Draft Articles on the Economic Zone, UN Doc. A/CONF.62/C.2/L.38 (1974), OR III, 214, 215 (Article 12).

10 A compromise was achieved between these two positions during the negotiations. The provision included in the negotiating text gave broad discretion to the coastal State to regulate fish stocks in their EEZ, whilst requiring it to take into account the recommendations of global, regional and subregional organizations. Despite several unsuccessful attempts to reduce the discretion of coastal States²⁵, the final text of the Convention incorporates this basic compromise position (→ Art. 61 (2); Art. 61 (3)).

III. Elements

1. ‘conservation and management measures’

11 Unlike the sequence of paragraphs in Art. 61, the following sub-sections will start with a discussion of the overall conservation and sustainable management objectives enshrined in Art. 61 (2), and then continue focusing on the central link of conservation and sustainable management with the concept of maximum sustainable yield (MSY) reflected in Art. 61 (3). Both of these factors are related to the determination of the TAC which is dealt with in Art. 61 (1) and is a prominent example of a conservation and management measure that must be taken by coastal States. The analysis will then turn to other possible conservation measures. Criteria for the determination of conservation and management measures are discussed, followed by an analysis of the role of science, precaution, exchange of information and cooperation with international organizations.

12 Art. 61 (2) requires coastal States to take ‘proper conservation and management measures’ in relation to the living resources of the EEZ. The basic objective of such measures is to ensure that such living resources are ‘not endangered by over-exploitation’. The provision has been criticized for not specifying the unit to be maintained (stock, species, biomass) or the precise level at which it is to be maintained.²⁶ The term ‘endangered’ is neither defined by the Convention, and as noted by BURKE, the meaning of this term is not obvious. BURKE argues that ‘the concept of “endangered” might be interpreted as implying a threat to survival, i.e., in danger of extinction, but it seems doubtful if this is very meaningful or helpful.’²⁷ He therefore proposes that the term should be understood to refer to ‘reductions in abundance that amount to commercial extinction, or, more strictly, to reductions of such magnitude that a species is likely to become endangered unless protective action is taken.’²⁸ This appears to be the best understanding of the term in light of the obligation found in Arts. 61 (3) to ‘also’ aim to maintain or restore populations of fish at levels that will produce the MSY.

2. ‘maximum sustainable yield’

13 The concept of MSY is at the centre of the regime for the conservation and management of living resources in the Convention (see also → Art. 119). It refers to the maximum catch that can be taken without negatively affecting the ability of a stock to maintain its population size. The term ‘population’ is not defined in the Convention, but can be understood as ‘a group of fish of one

²⁵ Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 606-608.

²⁶ E.g. *Marion Markowski*, *The International Law of EEZ Fisheries* (2010), 26.

²⁷ *William T. Burke*, *U.S. Fishery Management and the New Law of the Sea*, *AJIL* 76 (1982), 24, 32.

²⁸ *Ibid.*, 32.

species sharing common ecological and genetic features and more likely to breed with one another than with individuals from another such group.’²⁹

14 MSY is a biological concept that in principle can be calculated in an objective manner by the coastal State, provided that it has the relevant scientific information. However, the concept of MSY has been widely criticized by fisheries scientists and other commentators,³⁰ significantly because of the ‘factual obstacles inherent in determining cause and effect in respect of the use of living resources.’³¹ Whatever the merits of this debate, it is clear that coastal States have discretion to deviate from the objective of MSY when setting their conservation and management targets because Art. 61 (3) refers to MSY

‘as qualified by relevant environmental and economic factors, including the economic needs of coastal fishing communities and the special requirements of developing States, and taking into account fishing patterns, the interdependence of stocks and any generally recommended international minimum standards, whether subregional, regional or global.’³²

What environmental or economic factors should be taken into account will be up to the coastal State to decide and they would appear to have broad discretion in this regard. Indeed, despite the fact that the Convention makes no explicit reference to social factors, BURKE argues that ‘the other treaty provisions *in toto* convey ample authority on the coastal [S]tate to take such factors into account.’³³ Nonetheless, in the light of the object and purpose of this provision, as well as contemporary international environmental law, it is possible to conclude that MSY should be seen as acting as the *upper* limit beyond which harvesting levels are no longer sustainable: accordingly, coastal States are not allowed to set the qualified MSY above the biological MSY level.³⁴ This is further confirmed by the international target established to encourage and monitor States’ efforts to achieve sustainable fisheries and restore depleted stocks to levels that can sustain the MSY.³⁵

15 A coastal State may also have to take into account the interests of other States in determining conservation and management measures, if Art. 61 is read in light of Art. 56(2), which requires a coastal State to ‘have due regard to the rights and duties of other States’ when ‘exercising its rights and performing its duties under the Convention.’ For example, in the *Chagos Arbitration*, the United Kingdom was held to have violated Art. 56(2) by declaring a no-take marine protected area in the waters around the Chagos archipelago, because it had failed to consult with Mauritius in breach of an agreement between the two countries dating back to Mauritian independence.³⁶ The

²⁹ Markowski (note 26), 26.

³⁰ See e.g. the discussion in Douglas M. Johnston, *International Law of Fisheries* (1965), 49-55; David J. Attard, *The Exclusive Economic Zone in International Law* (1987), 153; Francisco O. Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989), 51.

³¹ Richard Barnes, *The Convention on the Law of the Sea: An Effective Framework for Domestic Fisheries Conservation?* in: David Freestone Richard Barnes/David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 235 and 242.

³² Emphasis added.

³³ Burke (note 27), 36.

³⁴ Markowski (note 26), 27-28; see the more pessimistic comments by Barnes (note 31), 243-244.

³⁵ UN World Summit on Sustainable Development, Report of the World Summit on Sustainable Development, UN Doc. A/CONF.199/20 (2002), 6 (Plan of Implementation of the World Summit on Sustainable Development), 23 (para. 31(a)); and follow-up by the General Assembly: e.g., GA Res. 65/38 of 7 December 2010, para. 2.

³⁶ PCA (Arbitral Tribunal Constituted under Annex VII UNCLOS), *The Chagos Marine Protected Area Arbitration* (Mauritius/United Kingdom of Great Britain and Northern Ireland), Award of 18 March 2015, available at: http://www.pca-cpa.org/showpage.asp?pag_id=1429.

Arbitral Tribunal elaborated that having ‘due regard’ entails consideration of the ‘nature of rights held by [other countries], their importance, the extent of the anticipated impairment, the nature and importance of activities contemplated [...] and the availability of alternative approaches’ leading to a ‘conscious balancing of rights and interests, suggestions of compromise and willingness to offer reassurances [...], and an understanding of [other countries]’ concerns in connection with the proposed activity.’³⁷

3. ‘allowable catch’

16 There are several types of conservation and management measures at the disposal of the coastal State to meet the objectives of Art. 61.³⁸ One measure which would seem to be obligatory is the calculation of the ‘allowable catch’. Art. 61 (1) says in mandatory terms that ‘the coastal State shall determine the allowable catch of the living resources in its exclusive economic zone.’ It has been suggested that this concept applies to both the overall catch in the EEZ and the allowable catch of individual stocks.³⁹ The provision does not differentiate between the commercially exploited and other fish stocks, thus in principle applying irrespective of the significance of fish stocks for the fishing industry. Indeed, the International Tribunal for the Law of the Sea has stressed that ‘in accordance with the Convention, the adoption by the coastal State of conservation and management measures for all living resources within its exclusive economic zone is mandatory’.⁴⁰ In practice, however, it is the allowable catch of commercially significant stocks that has generated most State practice as it is more important in light of the overarching duty to ensure that populations of harvestable species are maintained at levels that can produce the MSY. A recent review of State practice suggests that priority TACs are determined for fish stocks explored at or close to the maximum sustainable limit, but there is no consistent implementation of the obligation to establish TACs for all commercially significant stocks.⁴¹ One significant exception is the practice of the United States, which through a 2006 amendment to the Magnuson-Stevens Fishery Conservation and Management Act requires annual catch limits to be set for all managed fisheries, whether or not they are currently overfished.⁴²

4. Other Conservation Measures

17 The allowable catch is not the only conservation tool at the disposal of the coastal State. The provision refers to ‘proper conservation measures’. Some content can be given to this phrase by referring to Art. 62 which lists some of the types of measures that may be included in coastal State legislation, including licensing of fishermen, fishing vessels and equipment; regulating seasons and areas of fishing; regulating the types, sizes and number of fishing vessels that may be used; regulating the types, sizes and amount of gear that might be used; and fixing the age and size of fish

³⁷ *Ibid.*, paras. 519 and 535.

³⁸ *Cf.* also the wording of Art. 119 (1): ‘In determining the allowable catch and establishing other conservation measures’.

For further information, see *Rayfuse* on Art. 119.

³⁹ Nordquist/Nandan/Rosenne (note 25), 609.

⁴⁰ ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 96, available at: <https://www.itlos.org/en/cases/list-of-cases/case-no-21/>.

⁴¹ *Markowski* (note 26), 109-112.

⁴² Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006, 16 USC 1801. See *Juliet Eilperin*, US Tightens Fishing Policy, Setting 2012 Catch Limits for All Managed Species, *Washington Post*, 8 January 2012. Note however, that the United States is currently not party to the Convention and therefore this practice is not carried out in order to fulfill specific obligations under Arts. 61 or 119.

that may be caught. Once again, the coastal State would seem to have a broad degree of discretion in deciding what conservation and management measures to utilize. Relevant international standards, however, increasingly influence coastal States' choice of appropriate conservation measures.

5. Generally Recommended International Minimum Standards

18 In determining its conservation and management measures, a coastal State must, pursuant to Art. 61 (3), take into account 'any generally recommended international minimum standards, whether subregional, regional or global'. This reference is broad enough to cover a wide variety of fisheries standards adopted at the international level. In particular, it will cover several instruments adopted through the Food and Agriculture Organization (FAO) Fisheries Committee.⁴³ Prominent examples of generally recommended international standards adopted by the FAO include the Code of Conduct for Responsible Fisheries,⁴⁴ and the associated International Plans of Action which deal with Sharks, Seabirds, Fishing Capacity⁴⁵, and Illegal, Unreported and Unregulated Fishing.⁴⁶

19 Relevant international standards also include generally recommended international minimum standards adopted by other regional or subregional bodies, including many regional fisheries management organizations. Moreover, it is not limited to instruments adopted by fisheries organizations and it may also apply to the recommendations adopted by environmental organizations.⁴⁷ For example, decisions of the CBD Conference of the Parties relating to the conservation and sustainable use of marine biological diversity are relevant for coastal States when drawing up their conservation and management measures.⁴⁸ CBD guidance has thus elaborated on the concept of integrated marine and coastal management, including the ongoing assessment and monitoring of marine and coastal living resources, their interactions and impacts on ecosystems;⁴⁹ maintenance of the productivity and biodiversity of important and vulnerable marine areas; elimination of destructive fishing practices;⁵⁰ and more recently also the assessment of the impacts of climate change on the sustainability of fish stocks and the habitats that support them and the

⁴³ See *James Harrison*, *Making the Law of the Sea* (2011), 225.

⁴⁴ FAO, *Code of Conduct on Responsible Fisheries* (1995). See generally *Gerald Moore*, *The Code of Conduct for Responsible Fisheries*, in: Hey (note 4), 85.

⁴⁵ FAO, *International Plan of Action for the Conservation and Management of Sharks*, *International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries*, *International Plan of Action for the Management of Fishing Capacity* (1999). These plans were adopted at the 23rd session of the FAO Fisheries Committee in February 1999 and endorsed by the FAO Council in June 1999.

⁴⁶ FAO, *International Plan of Action to Prevent, Deter, and Eliminate Illegal, Unreported and Unregulated Fishing* (2001). This plan was adopted at the 24th session of the FAO Fisheries Committee in March 2001 and endorsed by the FAO Council in June 2001.

⁴⁷ Art. 31 (3) Vienna Convention on the Law of Treaties.

⁴⁸ See the so-called Jakarta Mandate on Marine and Coastal Biodiversity, COP CBD, Report of the Second Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/2/19 (1995), 59 (Decision II/10); the programme of work on marine and coastal biodiversity annexed to COP CBD, Report of the Fourth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/4/27 (1998), 84, 85 (Decision IV/5, Annex); COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Seventh Meeting: VII/5 Marine and Coastal Biological Diversity, UN Doc. UNEP/CBD/COP/DEC/VII/5 (2004), 10 (Annex, Elaborated Programme of Work on Marine and Coastal Biological Diversity).

⁴⁹ COP CBD Decision IV/5 (note 48), 85 (Annex, Basic Principles).

⁵⁰ COP CBD Decision VII/5 (note 48), 14 (Operational Objective 2.1.(i) and (h)).

integration of climate change-related concerns into relevant national strategies.⁵¹ Particular attention has been paid to the establishment of marine protected areas (MPAs) (see also → Art. 211 (6)), as an essential component of integrated coastal management,⁵² and as a key ‘conservation measure’ under Art. 61 (2). International goals have been established to increase the coverage of MPAs, their effective and equitable management, their ecological representativeness and connectivity with a view to establishing representative networks.⁵³ To these ends, CBD parties have adopted ‘Scientific Criteria for Identifying Ecologically or Biologically Significant Marine Areas in Need of Protection in Open-Ocean Waters and Deep-Sea Habitats’ and ‘Scientific Guidance for Selecting Areas to Establish a Representative Network of Marine Protected Areas, Including in Open-Ocean Waters and Deep-Sea Habitats’,⁵⁴ supporting the involvement of indigenous and local communities in the establishment and management of MPAs and the integration of their traditional knowledge.⁵⁵ The international community, however, is still elaborating clarifications on the objective and management of MPAs for fisheries purposes.⁵⁶

20 In addition, the ecosystem approach⁵⁷ (→ Art. 194 (5)) as elaborated under the CBD entails a management process aimed at integrating management of land, water and living resources, and promoting conservation and sustainable use in an equitable way. This is also a social process: different interested communities must be involved through the development of efficient and effective structures and processes for decision-making and management.⁵⁸ Within this process, traditional knowledge of local and indigenous communities should also be integrated.⁵⁹ Along similar lines, the FAO Code of Conduct calls upon States to seek to identify relevant domestic parties that have a legitimate interest in the use and management of fisheries resources and establish arrangements for consulting them to gain their collaboration in achieving responsible fisheries.⁶⁰ The participatory aspect of the ecosystem approach thus allows for the implementation of relevant international human rights obligations of coastal States, namely their obligation to ensure early and meaningful participation of concerned indigenous and local communities in decision-making processes on the conservation of traditional marine fishing grounds or that may affect traditional

⁵¹ COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting: X/29. Marine and Coastal Biodiversity, UN Doc. UNEP/CBD/COP/DEC/X/29 (2010), 2 (para. 7); GA Res. 65/37 of 7 December 2010, para. 3.

⁵² See discussion in *Tanaka* (note 7), 182-184; and the author’s conclusion that ‘MPAs are not a tool for integrated coastal management, but the integrated management approach is needed for the proper management of MPAs’ to ensure compatibility and effectiveness of MPAs, freedom of navigation and fisheries regulation, *ibid.*, 197.

⁵³ Plan of Implementation of the World Summit on Sustainable Development (note 35), 25 (para. 32 (c)); see also Decision VII/5 (note 48), 3-4 (paras. 18-19); see also COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Tenth Meeting: Decision X/2. The Strategic Plan for Biodiversity 2011-2020 and the Aichi Biodiversity Targets, UN Doc. UNEP/CBD/COP/DEC/X/2 (2010), 9 (Annex, Target 11).

⁵⁴ COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Eleventh Meeting: Decision IX/20. Marine and Coastal Biodiversity, UN Doc. UNEP/CBD/COP/DEC/IX/20 (2008), 11 (Annex II); acknowledged in GA Res. 65/37 of 7 December 2010, para. 180. For a discussion, Daniela Diz, ‘Marine biodiversity: unravelling the intricacies of global frameworks and applicable concepts’ in E Morgera and J Razzaque (eds), *Encyclopedia of Environmental Law: Biodiversity and Nature Protection Law* (forth 2016).

⁵⁵ COP CBD Decision IX/20 (note 54), 5 (paras. 26-27).

⁵⁶ See e.g. GA Res. 65/37 of 7 December 2010, para. 123.

⁵⁷ For further information, *cf. infra*, MN 26-27.

⁵⁸ COP CBD Decision X/29 (note 51), 4 (para. 13(h)) and 15 (Annex, lit. d).

⁵⁹ Art. 8 (j) CBD; see also Art. 12.12 FAO Code of Conduct.

⁶⁰ Art. 7.1.2 FAO Code of Conduct.

fishing practices or their rights.⁶¹

6. Best Available Scientific Evidence and the Precautionary Principle

21 Another important factor to be taken into account by the coastal State is scientific information about the state of fish stocks in its waters. Scientific information is clearly critical to the making of decisions about the conservation and management of fish stocks. Art. 61 (2) (*cf.* also → Art. 119 (1)(a)) requires the coastal State to take into account the ‘best available scientific evidence available to it’⁶² in designing its conservation and management measures. While Art. 61 (2) does not positively require coastal States to undertake scientific research (→ Part XIII), it has been argued that the primary obligation to conserve living resources in the EEZ ‘reasonably imposes the burden of acquiring data that make this obligation achievable.’⁶³

22 The requirement to take into account scientific evidence does not prevent a coastal State from adopting a precautionary approach to fisheries conservation and management. It is arguable that the precautionary approach is today a generally accepted principle of international law.⁶⁴ This principle has been incorporated in many fisheries instruments adopted since the 1982 Convention, as well as by the CBD Conference of the Parties in relation to marine biological diversity.⁶⁵ The General Assembly, which is the one of the principal international institution that reviews implementation of the EEZ fisheries provisions,⁶⁶ also periodically recalls the importance of a precautionary approach to EEZ fisheries.⁶⁷ According to the best known formulation of the precautionary approach, ‘where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation.’⁶⁸ It follows that it is not necessary to have scientific proof that a fish stock is overexploited prior to taking conservation and management measures. According to the precautionary approach, it is better to act earlier in order to prevent any irreversible harm to the fish stock, including by halting fishing activities.⁶⁹

23 Notably, international standards have provided detailed guidance on how to apply the precautionary principle to fisheries management through the concept of ‘reference points’.

⁶¹ Art. 27 International Covenant on Civil and Political Rights; UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 of 13 September 2007 (universally endorsed); UNCED, The Rio Declaration on the Environment and Development, UN Doc. A/CONF.151/5/REV.1 (1992), ILM 31, 874 (Rio Declaration), Principle 22; Agenda 21, Ch. 17.82 (b) and 17.83; Art. 6.18 FAO Code of Conduct. See discussion by *Markowski* (note 26), 83-90.

⁶² *Cf.* also *Franckx* on Art. 234 for the same term used in another context.

⁶³ *William T. Burke*, The New International Law of Fisheries: UNCLOS 1982 and Beyond (1994), 57.

⁶⁴ ITLOS Seabed Disputes Chamber, *Responsibilities and Obligations of States Sponsoring Persons and Entities with Respect to Activities in the Area*, Advisory Opinion of 1 February 2011, para. 135: ‘The Chamber observes that the precautionary approach has been incorporated into a growing number of international treaties and other instruments, many of which reflect the formulation of Principle 15 of the Rio Declaration. In the view of the Chamber, this has initiated a trend towards making this approach part of customary international law’, available at: http://www.itlos.org/fileadmin/itlos/documents/cases/case_no_17/adv_op_010211.pdf. For the precautionary approach/principle as codified in UNCLOS, see also *Tanaka* on Art. 1; *Czybulka* on Art. 192.

⁶⁵ COP CBD Decision IV/5 (note 48), 86 (Annex, para. 4): ‘The precautionary approach, as set out in decision II/10, annex II, paragraph 3 (a), should be used as a guidance for all activities affecting marine and coastal biological diversity’.

⁶⁶ *Barnes* (note 31), 258-259.

⁶⁷ GA Res. 66/68 of 6 December 2011, para. 7 calls upon ‘all States, directly or through regional fisheries management organizations and arrangements, to apply widely, in accordance with international law and the Code, the precautionary approach and the ecosystem approach’.

⁶⁸ Principle 15 Rio Declaration.

⁶⁹ *Markowski* (note 26), 43-50.

Reference points ‘identify the safe biological limit for harvesting, and other relevant constraints’.⁷⁰ The FAO differentiates between ‘conceptual’ reference points that capture in broad terms the management objective for the fishery and ‘technical’ reference points, which can be calculated or quantified on the basis of biological or economic characteristics of the fishery; as well as between ‘target’ reference points indicating a state of a fishing and/or resource which is considered to be desirable and at which management action, whether during development or stock rebuilding, should aim from ‘limit’ reference points indicating a state of a fishery and/or a resource which is considered to be undesirable and which management action should avoid.⁷¹ The FAO Code of Conduct on Responsible Fisheries calls upon States to apply ‘widely’ the precautionary approach to fisheries conservation and management, by taking into account

‘uncertainties relating to the size and productivity of the stocks, reference points, stock condition in relation to such reference points, levels and distribution of fishing mortality and the impact of fishing activities, including discards, on non-target and associated or dependent species, as well as environmental and socio-economic conditions’.⁷²

The Code also calls for including the need to determine target reference points and stock-specific limit reference points with a view to determining in advance conservation measures if reference points are exceeded and limit reference points approaches, and to applying these measures automatically.⁷³

24 The UN Fish Stocks Agreement (UNFSA) contains an obligation on coastal States to apply the precautionary approach widely to the conservation, management and exploitation of straddling fish stocks and highly migratory fish stocks found within their EEZ.⁷⁴ Annex II UNFSA contains guidelines for application of the precautionary approach through the identification of two types of precautionary reference points: on the one hand, States are to determine ‘conservation’ or ‘limit’ reference points, which set boundaries for safe biological limits within which the stock can produce MSY; and on the other hand, ‘management’ or ‘target’ reference points that are intended to represent management objectives.⁷⁵ Against this background, the guidelines require States to ensure that the risk of exceeding conservation reference points is very low and that management reference points are not exceeded on average.⁷⁶ When reference points are approached, they should not be exceeded; and if they are exceeded, States are mandated to take measures without delay for restoring stocks.⁷⁷ In addition, if a natural event adversely affects the status of stocks, States are required to adopt temporary emergency measures in order to avoid worsening the situation by over-fishing an affected stock.⁷⁸ In relation to exploratory fisheries, ‘cautious conservation and management measures’ are to remain in force until sufficient information has been acquired to permit a proper assessment of the impact of fishing upon the long-term sustainability of the

⁷⁰ *Birnie/Boyle/Redgwell* (note 6), 675.

⁷¹ *John F. Caddy/Rubin Mahon*, Reference Points for Fisheries Management: FAO Fisheries Technical Paper. No. 347 (1995).

⁷² Arts. 7.5.1 and 7.5.2 FAO Code of Conduct.

⁷³ Art. 7.5.3 FAO Code of Conduct; see also *Moore* (note 44), 97.

⁷⁴ Art. 6 UNFSA. See also the discussion on the relevance of the UNFSA for the interpretation of the Convention in *Harrison/Morgera* on Art. 63 MN 8.

⁷⁵ *Moritaka Hayashi*, The Straddling and Highly Migratory Fish Stocks Agreement, in: *Hey* (note 4), 55, 60.

⁷⁶ *Ibid.*

⁷⁷ Art. 6 (4) UNFSA.

⁷⁸ Art. 6 (7) UNFSA.

stocks.⁷⁹ The precautionary principle as applied in the UNFSA is thus not an ‘absolutist concept’, but rather calls for stock management to be handled ‘in a precautionary manner’ by taking into account uncertainties related to size and productivity of fish stocks, levels and distribution of fish mortality, and the impact of fishing activities on associated or dependent species, including existing and predicted environmental and socio-economic conditions,⁸⁰ without automatically preventing fishing once reference points are reached. This determination thus remains to be made on an ad hoc basis.⁸¹

25 Against this backdrop, the notion of ‘best’ scientific evidence found in Art. 61 suggests that States are under a duty to keep their conservation and management measures under review on the basis of the most up-to-date scientific evidence that is available to them. This means that precautionary measures are temporary and they must be kept under review by the coastal State. Thus, if additional scientific evidence concerning the conservation status of a stock comes to light, States must consider adapting or changing their conservation and management measures in light of these new findings. This is in line with the ecosystem approach and its support for ‘adaptive management’ based on environmental impact assessment, impact management, and the proactive identification and management of gaps in knowledge with a view to fuelling a process of continuous learning.⁸² Contracting parties to the CBD are specifically called upon to undertake environmental impact assessments and strategic environmental assessments to further strengthen sustainable use of living resources in areas within national jurisdiction.⁸³

7. Exchange of Available Scientific Information

26 In addition to the need for the coastal State to conduct its own research into fish stocks in its EEZ in order to gather relevant scientific evidence for the purposes of Art. 61, Art. 62 (4)(f) of the Convention permits the coastal State to require foreign vessels fishing in its EEZ to conduct specified fisheries research programmes. However, scientific evidence may also come from other sources such as research conducted by another State, inter-governmental organizations or non-governmental organizations. To ensure that States have access to a wide range of scientific sources, Art. 61 (5) calls for the regular exchange of available scientific information, catch and fishing effort statistics and other data relevant to the conservation of fish stocks through competent international organizations. The importance of the enhanced collection and sharing of fisheries data was also stressed in Agenda 21.⁸⁴

8. Cooperation with Competent Organizations

27 Art. 61 points to two instances of cooperation with competent international organizations: in the adoption of proper conservation and management measures to avoid over-exploitation (Art.

⁷⁹ Art. 6 (6) UNFSA.

⁸⁰ Art. 6 (3)(c) UNFSA.

⁸¹ *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Hey (note 4), 287, 320-321.

⁸² COP CBD, Report of the Fifth Meeting of the Conference of the Parties to the Convention on Biological Diversity, UN Doc. UNEP/CBD/COP/5/23 (2000), 103 (Decision V/6) and COP CBD, Decision Adopted by the Conference of the Parties to the Convention on Biological Diversity at Its Seventh Meeting: VII/11 Ecosystem Approach, UN Doc. UNEP/CBD/COP/DEC/VII/11 (2004).

⁸³ COP CBD Decision X/29 (note 51), 4 (para. 13(h)).

⁸⁴ Agenda 21, Ch. 17.87.

61 (2)) and in relation to the exchange of available scientific information (Art. 61 (5)). In both cases, the Convention foresees the possibility for relevant organizations to operate at the global, regional or sub-regional level. The most notable global organization is the FAO, which performs both normative and technical activities that can support member countries in the conservation of living resources, and also provides statistical and other data on fish stocks and fishing efforts. In fact, the FAO Constitution specifically requires member States to communicate to the Organization all official reports and statistics concerning fisheries,⁸⁵ thereby allowing the FAO to undertake the worldwide collection, compilation, analysis and diffusion of data and information in fisheries and aquaculture. In addition, the FAO has supported the strengthening of national capacity in the collecting, analysis and use of accurate, reliable and timely data, as well as cooperated in international efforts directed towards the development of standard concepts, definitions, classifications and methodologies for the collection and collation of fishery statistics.⁸⁶ Regional fisheries management organizations⁸⁷ have also, within their area of competence, contributed to the collection and exchange of scientific information.

9. Associated Species

28 Art. 61 is not solely concerned with the conservation of target species. Coastal States are also obliged to take into account the effect of fishing on associated or dependent species (→ Art. 61 (4)). These words have been criticized as '[having] no firm, generally accepted usage and [being] vague in nature'⁸⁸ and for qualifying these aspects as mere considerations subject to use concerns.⁸⁹ Nonetheless, it is suggested that they should be interpreted broadly, particularly in light of the obligation found in Part XII of the Convention whereby States must take measures to 'protect and preserve rare or fragile ecosystems as well as the habitat of depleted, threatened or endangered species and other forms of marine life' (→ Art. 194 (5)).⁹⁰ In other words, it can generally be said that the coastal State must apply the ecosystem approach to its conservation and management measures. This position is supported by interpreting the Convention in light of other developments in international environmental law. In particular, the ecosystem approach to marine resource management is recommended in consensus decisions adopted by the CBD Conference of the Parties,⁹¹ notably the CBD work programme on marine and coastal biodiversity which calls for the identification of key variables or interactions, for the purpose of assessing and monitoring: first, components of biological diversity; second, the sustainable use of such components; and, third, ecosystem effects⁹² The ecosystem approach is also stressed by the FAO Code of Conduct⁹³ and

⁸⁵ Arts. XI (5) and XVI Constitution of the Food and Agriculture Organization of the United Nations, 16 October 1945, available at: <http://www.fao.org/docrep/meeting/022/k8024e.pdf>.

⁸⁶ For further information, cf. the website of the FAO Fisheries and Aquaculture Department which provides statistics and information on fisheries: <http://www.fao.org/fishery/topic/2017/en>.

⁸⁷ See for an overview on fishery organizations specialized in migratory species, *Owen* on Annex I.

⁸⁸ *Attard* (note 30), 154.

⁸⁹ *Barnes* (note 31), 244.

⁹⁰ *Markowski* (note 26), 30-31.

⁹¹ COP CBD Decision IV/5 (note 48), 84, 85 (Annex, para. 2).

⁹² *Ibid.*

⁹³ FAO, International Guidelines on Bycatch Management and Reduction of Discards (2011), 13 (para. 7.3). The Guidelines were endorsed by the FAO Committee on Fisheries at its 29th session in February 2011, see FAO, Report of the Twenty-Ninth Session of the Committee on Fisheries, FAO Doc. FIPI/R973 (2011), 8-9 (para. 50).

was adopted as a global goal by the World Summit on Sustainable Development in 2002.⁹⁴ The principle is elaborated in other more specific instruments such as the International Plan of Action on Seabirds and the International Plan of Action on Bycatch and Discards. These instruments would qualify as generally recommended international minimum standards and they need to be taken into account by coastal States in accordance with Art. 61 (3).

29 One practical outcome of the ecosystem approach is that the coastal State may set an allowable catch not only for species which are directly targeted by a fishery, but also for associated species or so-called by-catch. To this end, Art. 61 (4) mandates coastal States to ‘take into consideration’ effects on associated or dependent species ‘with a view to managing or restoring populations of [these] species above levels at which their reproduction may become seriously threatened.’ This position is supported by the International Guidelines on Bycatch Management and Reduction of Discards which lists ‘limits and/or quotas on bycatches’ amongst the measures that can be taken by States in this regard.⁹⁵ The UN General Assembly has urgently called upon States to ‘develop and implement effective management measures to reduce the incidence of catch of non-target species, including utilization of selective fishing gear, where appropriate.’⁹⁶ Parties to the Convention on Migratory Species urged to assess the risk of bycatch arising from their gillnet fisheries, as it relates to migratory species, and increase efforts to collaborate with regional fisheries management organizations (RFMOs) in this regard⁹⁷ and they have also adopted action plans with the aim of reducing bycatch in relation to specific migratory species, including sharks⁹⁸ and sea turtles.⁹⁹

10. Outlook

30 Although international monitoring of coastal States’ implementation of Art. 61 has not been very systematic, in 2010 CBD parties established a global target that may contribute to closer international scrutiny of State practice in this respect: the target provides that by 2020 all fish is managed and harvested sustainably, legally and applying the ecosystem approach, so that overfishing is avoided, recovery plans and measures are in place for all depleted species, fisheries have no significant adverse impacts on threatened species and vulnerable ecosystems and the impacts of fisheries on stocks, species and ecosystems are within safe ecological limits.¹⁰⁰ To this end, CBD parties are called upon to ensure the sustainability of fisheries, by managing the impacts of fisheries on species and the wider ecosystem through implementing the ecosystem approach; minimizing the detrimental impacts of fishing practices; mitigating and managing by-catches sustainably and reducing discards, in order to attain a sustainable exploitation level of marine

⁹⁴ Plan of Implementation of the World Summit on Sustainable Development (note 35), 23 (para. 30(d)) and follow-up by GA Res. 65/37 of 7 December 2010, para. 111.

⁹⁵ COP CBD Decision V/6 (note 82); COP CBD Decision VII/11 (note 82).

⁹⁶ GA Res. 66/68 of 6 December 2008, para. 84.

⁹⁷ COP CMS, Bycatch of CMS-Listed Species in Gillnet Fisheries, UN Doc. UNEP/CMS/Resolution 10.14 (2011)

⁹⁸ See COP CMS, Memorandum of Understanding on the Conservation of Migratory Sharks, UNEP Doc. CMS/Sharks/Outcome 1.2 (2012), Annex 3 (Conservation Plan).

⁹⁹ See Memorandum of Understanding on the Conservation and Management of Marine Turtles and their Habitats of the Indian Ocean and South-East Asia Conservation and Management Plan (2009); Conservation and Management Plan for Marine Turtles of the Atlantic Coast of Africa (2008); Single Species Action Plan for the Loggerhead Turtle (*Caretta caretta*) in the South Pacific Ocean (2014).

¹⁰⁰ COP CBD Decision X/2 (note 53), 6 (Annex).

fishery resources and thereby contributing to a good environmental status in marine and coastal waters; and integrating climate change considerations in that context.¹⁰¹

¹⁰¹ COP CBD Decision X/29 (note 51), 12-13 (paras. 64-65, 67).

Article 62

Utilization of the living resources

1. The coastal State shall promote the objective of optimum utilization of the living resources in the exclusive economic zone without prejudice to article 61.
2. The coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone. Where the coastal State does not have the capacity to harvest the entire allowable catch, it shall, through agreements or other arrangements and pursuant to the terms, conditions, laws and regulations referred to in paragraph 4, give other States access to the surplus of the allowable catch, having particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein.
3. In giving access to other States to its exclusive economic zone under this article, the coastal State shall take into account all relevant factors, including, *inter alia*, the significance of the living resources of the area to the economy of the coastal State concerned and its other national interests, the provisions of articles 69 and 70, the requirements of developing States in the subregion or region in harvesting part of the surplus and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks.
4. Nationals of other States fishing in the exclusive economic zone shall comply with the conservation measures and with the other terms and conditions established in the laws and regulations of the coastal State. These laws and regulations shall be consistent with this Convention and may relate, *inter alia*, to the following:
 - (a) licensing of fishermen, fishing vessels and equipment, including payment of fees and other forms of remuneration, which, in the case of developing coastal States, may consist of adequate compensation in the field of financing, equipment and technology relating to the fishing industry;
 - (b) determining the species which may be caught, and fixing quotas of catch, whether in relation to particular stocks or groups of stocks or catch per vessel over a period of time or to the catch by nationals of any State during a specified period;
 - (c) regulating seasons and areas of fishing, the types, sizes and amount of gear, and the types, sizes and number of fishing vessels that may be used;
 - (d) fixing the age and size of fish and other species that may be caught;
 - (e) specifying information required of fishing vessels, including catch and effort statistics and vessel position reports;
 - (f) requiring, under the authorization and control of the coastal State, the conduct of specified fisheries research programmes and regulating the conduct of such research, including the sampling of catches, disposition of samples and reporting of associated scientific data;
 - (g) the placing of observers or trainees on board such vessels by the coastal State;
 - (h) the landing of all or any part of the catch by such vessels in the ports of the coastal State;

- (i) terms and conditions relating to joint ventures or other cooperative arrangements;**
- (j) requirements for the training of personnel and the transfer of fisheries technology, including enhancement of the coastal State's capability of undertaking fisheries research;**
- (k) enforcement procedures.**

5. Coastal States shall give due notice of conservation and management laws and regulations.

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I. Purpose and Function

1 Art. 62 provides complementary obligations concerning the exercise of coastal States’ sovereign rights for the purpose of sustainably managing the living natural resources in the exclusive economic Zone (EEZ) (→ Art. 56 (1)(a)). Whilst Art. 61 sets out the obligation to conserve fish stocks, Art. 62 focuses on economic and equitable considerations arising from the recognition that fish are a valuable resource which should not be squandered. It was a common position at UNCLOS III that ‘[t]he waste of biological resources which would result from [excluding other non-coastal States from fishing in the EEZ] could not be justified at a time when there was a world shortage of protein.’¹ Since the conclusion of UNCLOS, fish has become an even more important source of food for many people. According to the Food and Agriculture Organization (FAO), marine capture fisheries provided about 115 million tonnes of fish for human consumption in 2008 and ‘[g]lobally, fish provides more than 1.5 billion people with almost 20 percent of their average per capita intake of animal protein, and 3.0 billion people with at least 15 per cent of such protein.’² It is therefore vital that the fisheries regime continues to allow people to have access to this source of nutrition. It is this purpose which is served by the concept of optimum utilization.

2 The underlying function of Art. 62 is to allow other States to have access to fish stocks if the coastal State cannot harvest those stocks itself. It therefore acts as a balance against the allocation of EEZs to coastal States³. The objective of optimum utilization is ‘without prejudice’ to Art. 61 which means that this objective does not remove the need for a State to set an allowable catch based upon, *inter alia*, the conservation status of a fish stock. Rather Art. 62 regulates *access* to the allowable catch. Art. 62 introduces an obligation for the coastal State to calculate its own harvesting capacity in order to determine whether there is a surplus in the allowable catch. Art. 62 then indicates both the way in which the coastal State should allocate the surplus of the allowable catch and the conditions which may be attached to access to living resources in its EEZ. Art. 62 must be read in connection with Arts. 69 and 70 which deal with the particular rights of land-locked and geographically disadvantaged States in relation to the living resources of the EEZ.

II. Historical Background

3 The provisions on access to fish stocks and the allocation of fishing rights developed alongside the general framework for fisheries management in the EEZ.⁴ Once it had been agreed that coastal States would have certain rights to manage fish stocks in their adjacent waters, it became necessary to address the extent of those rights and whether other States would have any access to fish in the EEZ at all. As noted above, many States were concerned about the need to maximize catches in order to satisfy rising demands for food. An early proposal by the United States thus provided that

‘in order to assure the maximum utilization and equitable allocation of coastal and anadromous resources, the coastal State [...] may reserve to its flag vessels that portion of the allowable annual

¹ Statement of Lapointe (Canada), Second Committee UNCLOS III, 29th Meeting, UN Doc. A/CONF.62/C.2/SR.29 (1974), OR II, 224, 225. See also FAO, Report of the Expert Consultation on the Conditions of Access to the Fish Resources of the Exclusive Economic Zone, Doc. FIPP/R293 (1983), para. 10.

² FAO, State of the World Fisheries and Aquaculture (2010), 3.

³ For further information, see *Proelss on Art. 56 MN XX*.

⁴ For further information on the development of fisheries in the EEZ, cf. *Harrison/Morgera* on Art. 61 MN 5 *et seq.*

catch they can harvest [and] the coastal State shall provide access by other States, under reasonable conditions, to that portion of the resources not fully utilized by its vessels [...].⁵

Whilst there was little disagreement amongst delegates over the principle of access for other States to the surplus of the allowable catch, there were divergent opinions on which States should have access to fish stocks and whether the Convention should establish a system of hierarchy. The US proposal cited above proposed that priority should be given to 'States that have traditionally fished for a resource' followed by 'other States in the region, particularly landlocked States and other States with limited access to the resources, with whom joint or reciprocal arrangements had been made.'⁶ Thus, they sought to preserve the status quo prior to the establishment of the EEZ, including their own distant-water fishing fleet. Unsurprisingly, this position was shared by other States which had traditionally engaged in distant water fishing activities. For instance, the Eastern European Socialist States suggested that priority should be given to '[S]tates which have borne considerable material and other costs of research, discovery, identification and exploitation of living resource stocks or which have been fishing in the region involved' followed by 'developing countries, land-locked countries, countries with narrow access to the sea or with narrow continental shelves, and countries with very limited living resources', with any other surplus going to 'all other States without discrimination'.⁷ In contrast, other States proposed giving priority to developing land-locked States and geographically disadvantaged States.⁸ The compromise position that was adopted in the negotiating text required the coastal State to 'take into account all relevant factors', albeit with no particular priority.⁹ However, not all States were satisfied with this compromise and the issue remained a point of controversy on the agenda of the Conference.

4 The negotiation of Art. 62 was closely connected with the question of the rights of land-locked and geographically disadvantaged States more generally (→ Art. 69; Art 70). As the issue remained unresolved by the seventh session of the Conference in 1978, it was sent to a special negotiating group under the chairmanship of SATYA NANDAN of Fiji. He proposed an amendment to the draft text of Art. 62, providing that the coastal State should have 'particular regard' to the interests of land-locked and geographically disadvantaged States, especially the developing States in those categories.¹⁰ The formula was inserted into the Informal Composite Negotiating Text (ICNT) at the eighth session of the Conference in 1978. Despite this change, the land-locked and geographically disadvantaged States continued to express concern that the negotiating text did not meet their needs.¹¹ These States made further proposals for amendment, but none of them gained sufficient support to justify altering the draft negotiating text. By this stage modifications to the ICNT could only be made if they benefited from 'widespread and substantial support prevailing in the Plenary'.¹² Whilst minor drafting changes were made to what would become Art. 62 in the final

⁵ Sea-Bed Committee, United States: Revised Draft Fisheries Article, UN Doc. A/AC.138/SC.II/L.9 (1972), 2.

⁶ *Ibid.* See also Second Committee UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222.

⁷ Second Committee UNCLOS III, Bulgaria *et al.*: Draft Articles on the Economic Zone, UN Doc. A/CONF.62/C.2/L.38 (1974), OR III, 214-216.

⁸ See Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 627.

⁹ UNCLOS III, Informal Single Negotiating Text (Part II), UN Doc. A/CONF.62/WP.8/PART II (1975), OR IV, 152, 160 (Article 51).

¹⁰ UNCLOS III, Reports of the Committees and Negotiating Groups on Negotiations at the Resumed Seventh Session, UN Doc. A/CONF.62/RCNG/1 (1978), OR X, 88 (Explanatory Memorandum on the Proposals (NG/4/9/Rev.2) by the Chairman of Negotiating Group 4 – Ambassador Satya Nandan).

¹¹ Nordquist/Nandan/Rosenne (note 8), 633-634.

¹² UNCLOS III, Organization of Work: Decisions Taken by the Conference at its 90th Meeting on the Report of the General Committee, UN Doc. A/CONF.62/62 (1978), OR IX, 6, 8 (para. 10).

sessions of the Conference, the substance of this provision reflected the compromise that had been suggested by NANDAN in 1978.

III. Elements

1. 'The coastal State shall promote the optimum utilization'

5 The laconic provision in Art. 62 (1) clarifies that coastal States have an obligation to promote the objective of 'optimum utilization' of the living resources in the EEZ. The term 'optimum utilization' is not expressly defined by the Convention. Considering the provision in its context, however, it is clear that this phrase is *not* to be interpreted as the full utilization of the resource.¹³ Rather, the language of Art. 62 makes clear that it is subordinated to Art. 61 and it follows that 'optimum utilization' refers to the optimum utilization of the allowable catch which has been set in accordance with Art. 61. Thus, Art. 62 does not override the obligation on the coastal State to pursue the objective of promoting the maximum sustainable yield.

2. 'shall determine its capacity to harvest [...] access to the surplus'

6 According to Art. 62 (2), 'the coastal State shall determine its capacity to harvest the living resources of the exclusive economic zone' and 'where [it] does not have the capacity to harvest the entire allowable catch', it shall 'give other States access to the surplus of the allowable catch'. The calculation of the surplus is therefore critical for the application of the provisions relating to the idea of optimum utilization and the allocation of fishing rights in the EEZ to other States.

7 Whilst there is a definite obligation on a coastal State to determine its capacity to harvest the living resources of the EEZ, it would appear that the coastal State has a broad discretion in doing so. The concept of 'harvesting capacity' is left undefined by the Convention. Perhaps the most obvious way of calculating harvesting capacity is by reference to those nationals of the coastal State involved in harvesting fish stocks in the EEZ. Nationals clearly include natural persons but it may also be interpreted to include fishing vessels flagged in the coastal State (→ Art. 91), regardless of the nationality of the crew.¹⁴ The consequence of this wider interpretation is that it opens up the possibility for a coastal State to artificially increase its harvesting capacity by allowing nationals of another State to fish in vessels flying their flag. Yet, such a practice would be completely in accordance with international law. For example, in the *Dispute Concerning Filleting within the Gulf of Lawrence*, the arbitral tribunal held that

'the right for a State to determine through its legislation the conditions for the registering of ships in general and fishing vessels in particular falls within the sole competence of the said State, to the extent that there is a substantial link between the State and the ship and that the State of the flag actually exercises its jurisdiction and control over the ships flying its flag.'¹⁵

In that case, the tribunal refused to look beyond the fact of registration to determine the origins of the vessel. More recently, the International Tribunal for the Law of the Sea has confirmed in *The M/V 'Saiga' (No. 2) Case* that

¹³ David Freestone, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: Ellen Hey (ed.), *Developments in International Fisheries Law* (1999), 287, 301.

¹⁴ This is the interpretation of nationals adopted in the 1958 Convention on Fishing and the Conservation of the Living Resources of the High Seas, cf. its Art. 14: 'the term "nationals" means fishing boats or craft of any size having the nationality of the State concerned, according to the law of that State, irrespective of the nationality of the members of their crews'.

¹⁵ *Dispute Concerning Filleting in the Gulf of St Lawrence* (France v. Canada), Award of 17 July 1986, ILR 82, 590 (para. 27).

‘the purpose of the provisions of the Convention on the need for a genuine link between a ship and its flag State is to secure more effective implementation of the duties of the flag State, and not to establish criteria by reference to which the validity of the registration of ships in a flag State may be challenged by other States.’¹⁶

In other words, genuine link does not require the vessel to be owned or operated by a national of the flag State. It follows that

‘each coastal [S]tate is free to introduce foreign capital and to obtain technical assistance from foreign nations, and it is also free to allow any foreign nations or foreign enterprises it chooses to engage in fishing activities through concessionary agreements and to secure the maximum of the total allowable catch for itself.’¹⁷

ODA has criticized this aspect of Art. 62 because ‘the principle of access [...] to the surplus will eventually become meaningless.’¹⁸ The only apparent restriction on the coastal State is that it acts in good faith (→ Art. 300)¹⁹, although it must be asked whether or not this is a sufficient safeguard against abuse of the right by coastal States.

8 It is not only commercial fisheries which must be taken into account when calculating the harvesting capacity. Indeed, international law may require coastal States to take particular care to protect subsistence fisheries. According to the FAO Code of Conduct²⁰, States are called upon to ‘guarantee where appropriate, preferential access to subsistence, artisanal and small-scale fisherman to traditional fishing grounds.’²¹ Furthermore, taking into account human rights instruments and the Convention on Biological Diversity, States must arguably ensure that indigenous peoples and local communities benefit from the management system and are allocated a fair share of fishing rights in order to adequately protect subsistence fishing activities and sustainable customary practices.²² Some States have adopted legislation which explicitly accords fishing rights to subsistence fishing communities.²³

9 It appears that a coastal State can make a unilateral determination of its harvesting capacity and there is no right for other States to participate in this process.²⁴ Nor is this likely to be an issue that can be challenged under the dispute settlement procedures in the Convention (→ Part XV) as Art. 297 (3)(a) provides that

¹⁶ ITLOS, *The M/V ‘Saiga’ (No. 2) Case* (Saint Vincent and the Grenadines v. Guinea), Judgement of 1 July 1999, ITLOS Reports (1999), 10, para. 83

¹⁷ *Shigeru Oda*, Fisheries under the United Nations Convention on the Law of the Sea, AJIL 77 (1983), 739, 734. See also *David J. Attard*, The Exclusive Economic Zone in International Law (1987), 159-160.

¹⁸ *Ibid.*, 744.

¹⁹ See also *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), para. 27: ‘It should therefore be concluded that the registration of trawlers referred to in Art. 4(b) [of the 1972 Treaty between Canada and France], effected in conformity with the provisions of French legislation, was considered by the Parties, together with the principle of good faith which is of necessity a principal factor in the performance of treaties, as affording a sufficient guarantee against any risk of the French Party exercising its rights abusively.’ See also *Attard* (note 17), 160.

²⁰ FAO, Code of Conduct on Responsible Fisheries (1995)

²¹ Art. 6.18 FAO Code of Conduct.

²² Art. 1 (2) International Covenant on Economic, Social and Cultural Rights; Art. 26 UN Declaration on the Rights of Indigenous Peoples, GA Res. 61/295 of 13 September 2007; FAO Voluntary Guidelines for Securing Small-scale Fisheries in the context of Food Security and Poverty Eradication (2014); and Art. 10 (c) of the Convention on Biological Diversity, which provides that ‘each Contracting Party shall, as far as possible and appropriate, [...] protect and encourage customary usage of biological resources in accordance with traditional cultural practices that are compatible with conservation or sustainable use requirements’. See discussion in Report of the Special Rapporteur on the right to food, UN Doc A/67/268 (2012) and *Marion Markowski*, The International Law of EEZ Fisheries (2010), 89-90 and 100-101.

²³ See South Africa’s Marine Living Resources Act 1998, as discussed in *Emma Witbooi*, Fishing Rights: A New Dawn for South Africa’s Marine Subsistence Fishers, Ocean Yearbook 19 (2005), 74-104.

²⁴ *Attard* (note 17), 159 and 165.

‘the coastal State shall not be obliged to accept the submission to such settlement of any dispute relating to its sovereign rights with respect to the living resources in the exclusive economic zone or their exercise, including its discretionary powers for determining the allowable catch, its harvesting capacity, the allocation of surpluses to other States and the terms and conditions established in its conservation and management laws and regulations.’²⁵

Such disputes may only be submitted to conciliation in accordance with Annex V, Section 2 of the Convention if it is alleged that a coastal State has ‘arbitrarily refused to determine, at the request of another State, the allowable catch and its capacity to harvest living resources with respect to stocks which that other State is interested in fishing.’²⁶ This provision confirms the broad discretion that coastal States have in determining their harvesting capacity, as decisions of a conciliation commission are not binding.²⁷

10 It also emerges from practice that the concept of surplus may have ‘played a very limited role’, at least in relation to the European Union’s access agreements²⁸: with regards to access to EU waters by third-country vessels, this was permitted on a reciprocal basis to maintain existing fishing patterns even if no surplus catch was available in EU waters; and with respect to EU vessels access to third-country waters, access agreements were concluded without being explicitly based on access to the surplus but rather other criteria.²⁹

3. ‘In giving access to other States [...] the coastal State shall take into account [...]’

11 If a coastal State determines that there is a surplus, it must decide how to allocate that surplus to other States. In this regard, Art. 63 (3) provides that in allocating the surplus of its allowable catch, ‘the coastal State shall take into account all relevant factors’. The provision lists several such factors, including the significance of the living resources to the local economy of the coastal State and its other national interests, the rights of land-locked and geographically disadvantaged States (→ Art. 69; Art. 70), the requirements of developing States, and the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks. It is clear that this list is illustrative and other relevant factors can be taken into account.³⁰ Of perhaps greater significance is the lack of any explicit hierarchy. As noted above, several proposals were made at UNCLOS III to introduce a hierarchy but none were successful. The result is, in the words of one author, that the coastal State has ‘the broadest discretion to decide to whom and under what conditions access will be granted’.³¹ In this regard, ORREGO VICUÑA notes that ‘it is precisely because this discretionary power is linked to the sovereign and exclusive nature of the coastal State’s rights that the chief criterion that will guide the granting of access will be its own national interest.’³²

12 One of the effects of Art. 62 (3) is to extinguish any historical rights to fish that other States may have previously had in coastal waters prior to the establishment of the EEZ. This differs from the position adopted by the International Court of Justice in the *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland) where a condition for Iceland extending its jurisdiction was to

²⁵ Emphasis added.

²⁶ Art. 297 (3)(b)(ii). For further information, see *Serdy* on Art. 297 MN XX. **CROSS REF.**

²⁷ Art. 7 (2) Annex V UNCLOS. Moreover, Art. 8 of Annex V confirms that parties to a dispute have the right to reject the proposals of the Conciliation Commission.

²⁸ Robin R. Churchill/Daniel Owen, *The EC Common Fisheries Policy* (2010), 330

²⁹ *Ibid.*

³⁰ Nordquist/Nandan/Rosenne (note 8), 637.

³¹ Francisco O. Vicuña, *The Exclusive Economic Zone: Regime and Legal Nature under International Law* (1989), 54.

³² *Ibid.*, 54-55.

recognize the rights of those States which had historically fished in the vicinity of its coast.³³ In contrast, there is no automatic right under UNCLOS to continue fishing in waters where fishing has traditionally taken place. Rather, such States are but one category of States which may be permitted access to the surplus under Art. 62 (3). This interpretation of Art. 62 was confirmed by the Tribunal in the South China Sea Arbitration, which noted that ‘the notion of sovereign rights over living and non-living resources is generally incompatible with another State having historic rights to the same resources.’³⁴

13 The only possible indication of any hierarchy in Art. 62 (3) is the requirement that the coastal State should have ‘particular regard to the provisions of articles 69 and 70, especially in relation to the developing States mentioned therein’. Arts. 69 and 70 deal with the rights of land-locked and geographically disadvantaged States in relation to the living resources of the EEZ. Yet, the cross-reference to these provisions falls short of granting a preference to land-locked and geographically disadvantaged States in allocating the surplus of the allowable catch. Taking into account the language of the provision, as well as the breadth of the discretion of coastal States, it would seem reasonable to conclude that

‘the variety of considerations which the coastal State may entertain in giving other States the right of access to the surplus of the living resources of its exclusive economic zone confirms that this right of access is a relative right’.³⁵

Moreover, in practice, ATTARD has observed that ‘there is no firm evidence to support this view that the consideration accorded to the rights of [land-locked and geographically disadvantaged States] referred to in Article 62 (3) is taken into account by [S]tates.’³⁶

14 Indeed, there is a question whether the surplus must be allocated at all by the coastal State. The inclusion of ‘the importance of the living resources of the area to the economy of the coastal State’, as well as its ‘other national interests’, in the list of factors to be taken into account by the coastal State suggests that there may be situations where the coastal State might legitimately decide not to allocate the surplus to another State, at least temporarily. It is these factors which would explain the practice of some States in withholding part of the allowable catch as a reserve against the possible increase in their harvesting capacity at a later stage in the fishing season. Whilst some commentators have questioned the legality of such a practice³⁷, it can be explained on the basis of the importance of economic factors or other national interests which are legitimate factors for the coastal State to take into account in deciding how to allocate its surplus.

15 Current practice indicates that coastal States’ laws do not specify any factors to be taken into account in allocating the surplus,³⁸ so that it is left entirely to negotiations with States seeking access to the EEZ. Negotiations may take place with the flag State or in some circumstances the coastal State may negotiate directly with fishing operators. In the case of State-to-State

³³ ICJ, *Fisheries Jurisdiction Case* (Federal Republic of Germany v. Iceland), Merits, Judgment of 25 July 1974, ICJ Reports (1974), 175, para. 61.

³⁴ PCA (Arbitral Tribunal Constituted under Annex VII UNCLOS) *The South China Sea Arbitration* (Philippines/China), Merits, Award of 12 July 2016, para. 243; available at <https://pcacases.com/web/view/7>. See also paras 800-804, in which the Tribunal distinguishes the position of customary fishing rights in the territorial sea and archipelagic waters on the one hand and in the exclusive economic zone on the other hand.

³⁵ Nordquist/Nandan/Rosenne (note 8), 636-637 (MN 62.16(g)).

³⁶ Attard (note 17), 169.

³⁷ John W. Kindt, *The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species*, *Syracuse Journal of International Law and Commerce* 11 (1984), 9, 30: ‘By precluding foreign fishermen from catching the available surplus of U.S. fish, this provision appears to violate the letter and spirit of article 62 of the LOS Convention’ See the more nuanced comments of William T. Burke, *U.S. Fishery Management and the New Law of the Sea*, *AJIL* 76 (1982), 24, 39.

³⁸ Markowski (note 22), 67.

negotiations, it is common for the States concerned to conclude an access agreement. There are two principal types of such agreement.³⁹ Firstly, agreements may provide a medium term framework for fisheries cooperation which set general principles but require specific decisions concerning access to be made on an annual basis, either by agreement between the parties or unilaterally by the coastal State. Alternatively, an access agreement may be a self-contained agreement which specifies the details of the access offered by the coastal State in the agreement itself, including the number of vessels authorized and the payment to be made.

16 In the majority of cases, developing States' EEZ are accessed by distant-water fishing fleets from developed countries, so questions have emerged as to the unequal bargaining power in the negotiations on access. In particular the General Assembly has called for access agreements with developing countries 'on equitable and sustainable basis' with a view to assisting the realization of the benefits from the development of fisheries resources in developing States.⁴⁰

17 As a major distant water fishing entity, the EU provides an important source of practice concerning the conclusion of access agreements. In the past, the EU has simply entered into agreements to pay coastal States in return for access to their fish stocks. The more recent practice of the EU reflects a more serious regard for the needs of developing countries to benefit from the arrangement and general cooperation agreements between the EU and developing countries increasingly seek to promote the sustainable utilization of fish stocks within the coastal State. For instance, in the Cotonou Agreement between the EU and its Member States, and 77 African, Caribbean and Pacific (ACP) countries, parties – which include 'nearly all developing States' with which the EU concluded access agreements⁴¹ – 'expressed their willingness' to negotiate fisheries agreements aimed at guaranteeing 'sustainable' and mutually satisfactory conditions for fishing activities in ACP States.⁴² In its 2010 version, the Cotonou Agreement further provides that, with reference to marine resources within the EEZs of ACP States, cooperation aims at further developing these sectors in ACP countries to increase the associated social and economic benefits in a sustainable manner in light of the contribution of these sectors to employment creation, revenue generation, food security, livelihoods of rural and coastal communities and poverty reduction. The agreement identifies in detail the cooperation activities to be undertaken to this end, including: development and implementation of national and regional sustainable aquaculture and fisheries development strategies and management plans; mainstreaming of aquaculture and fisheries into national and regional development strategies; and the development of joint ventures for investment in the sector. Notably, the new provision anticipates a high-level consultation, including at ministerial meetings, upon joint agreement with a view to developing, improving or strengthening ACP-EU development cooperation in this sector. It also requires that any fisheries agreements that may be negotiated between the EU and ACP States pay due consideration to consistency with development strategies in this area.

18 Turning to the EU's practice concerning fisheries access agreements themselves, the EU has attempted to shift from a so-called practice of 'pay, fish and leave' bilateral access agreements to a new generation of 'Fisheries Partnerships Agreements', launched in 2002, that aims to provide a legal basis through policy dialogue about sensitive sustainability issues with developing coastal

³⁹ See *Jean Carrox/Michel Savini*, *The Practice of Coastal States Regarding Foreign Access to Fishery Resources*, in: *FAO Fish Resources Report* (note 1), Annex 2.

⁴⁰ GA Res. 61/105 of 6 March 2007, para. 100.

⁴¹ *Churchill/Owen* (note 28), 345.

⁴² Partnership Agreement between the Members of the African, Caribbean and Pacific Group of States of the One Part, and the European Community and Its Member States, of the Other Part, Signed in Cotonou on 23 June 2000, OJEU 2000, L 317/3 (Cotonou Agreement). See Art. 23 of its 2010 revision at: http://ec.europa.eu/development/icenter/repository/second_revision_cotonou_agreement_20100311.pdf.

States.⁴³ These agreements thus aim to strengthen cooperation between the EU and third States in the promotion of sustainable fisheries in the third-State waters through the joint monitoring of the State of fisheries resources by a joint scientific committee and consultations on sustainable fisheries measures.⁴⁴ According to these agreements, the EU financial contribution is to be divided between payment for access and support for fisheries management activities in the coastal State, with a defined percentage of payment to be devoted to the promotion of conservation of resources and sustainable development in the coastal State.⁴⁵ These agreements, however, have been criticised for their limited attention to subsistence fisheries in coastal States.⁴⁶

19 Although it is not a party to the Convention, the practice of the United States concerning allocation of fisheries surplus also provides an interesting illustration of the manner in which this power can be used. The relevant domestic legislation explicitly provides that ‘allocations of [the total allowable level of foreign fishing] are discretionary’⁴⁷ and ‘the Secretary of State [...] determines the allocation among foreign nations of fish species and species groups.’⁴⁸ National laws dictate a number of considerations to be taken into account when determining access to fish stocks in United States waters, which not only include issues mentioned in the Convention, such as ‘whether, and to what extent, the fishing vessels of such nation have traditionally engaged in fishing in such fishery’⁴⁹ and ‘whether, and to what extent, such nation requires the fish harvested from the exclusive economic zone for its domestic consumption’⁵⁰, but also issues related to trade⁵¹ and cooperation in the enforcement of fisheries regulations.⁵² Indeed, the so-called Packwood Amendment requires the Secretary of State to reduce access to US fish stocks by 50% if a foreign fishing vessel is flagged in a country which is certified as ‘conducting fishing operations or engaging in trade or taking which diminishes the effectiveness of the International Convention for the Regulation of Whaling.’⁵³ The threat of certification and withdrawal of access to fisheries resources was used by the United States in the 1980s as a means to persuade Japan to withdraw its reservations to the moratorium on commercial whaling.⁵⁴ This power was subsequently exercised when Japan commenced its scientific whaling programme in 1987, but as noted by one commentator, ‘the action was less significant as it appeared [as] the U.S. fishery-management councils already had concluded that the fish stocks in the U.S. fishery-conservation zone were too low [and] Japan had consequently not been allocated a quota for 1988.’⁵⁵ Nevertheless, this example illustrates the exercise of fisheries quotas as a tool to promote a range of policy objectives, which would seem to be compatible with the provisions of the Convention.

20 The United States has also used fisheries access agreements to the benefit of its distant-water fishing fleet. The most important of these agreements is the Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of

⁴³ See generally, *Churchill/Owen* (note 28); reference to Fisheries Partnership Agreements can be found in the Art. 53 (1) Cotonou Agreement.

⁴⁴ *Churchill/Owen* (note 28), 346-348.

⁴⁵ *Ibid.*, 348.

⁴⁶ *John Vogler/Charlotte Bretherton*, The European Union as a Sustainable Development Actor: the Case of External Fisheries Policy, *Journal of European Integration* 30 (2008), 401.

⁴⁷ §600.516(a) Magnuson-Stevens Fishery Conservation and Management Act (US).

⁴⁸ §600.517 Magnuson-Stevens Fishery Conservation and Management Act (US).

⁴⁹ 16 US Code §1824(e)(1)(E)(vi).

⁵⁰ 16 US Code §1824(e)(1)(E)(iv).

⁵¹ 16 US Code §1824(e)(1)(E)(i) and (ii).

⁵² 16 US Code §1824(e)(1)(E)(iii).

⁵³ 16 US Code §1824(e)(2).

⁵⁴ See *Sean D. Murphy*, *United States Practice in International Law*, vol. 1 (2011), 171-172.

⁵⁵ *Ibid.*, 172.

America.⁵⁶ The treaty applies to the waters of several States in the Pacific, including Australia, the Cook Islands, the Federated States of Micronesia, Fiji, Kiribati, the Marshall Islands, Nauru, New Zealand, Niue, Palau, Papua New Guinea, the Solomon Islands, Tonga, Tuvalu, Vanuatu, and Western Samoa. Under the agreement, US fishing vessels are permitted to engage in fishing in the waters of the Pacific Island parties in accordance with the terms and conditions contained in annexes to the treaty⁵⁷, whereas the United States agrees to ‘cooperate with the Pacific Island parties through the provision of technical and economic support to assist the Pacific Island parties to achieve the objective of maximizing benefits from the development of their fisheries resources.’⁵⁸ The economic benefits include a lump-sum access fee⁵⁹ and the treaty also specifies that US vessels should use, as appropriate, the canning, transshipment, slipping and repair facilities located in the Pacific Island parties, purchase as appropriate equipment and supplies from these parties, and employ as appropriate nationals from the parties on board US fishing vessels.⁶⁰ The treaty first entered into force in 1988 and its application was provisionally extended on a number of occasions. A revised version of the treaty was agreed in principle in June 2016, although it is subject to further review before it can be opened for signature.⁶¹

21 China, Korea and Japan are also all significant distant-water fishing nations but information concerning their practice is more difficult to come by as access agreements are not necessarily published. Generally speaking, one source suggests that ‘most of this access is based on the payment of license fees by individual vessels to coastal countries, rather than a broad country-to-country agreement.’⁶²

22 Like other discretionary decisions of the coastal State relating to EEZ fisheries, decisions concerning the allocation of the surplus are not subject to binding dispute settlement (→ Art. 297 (3)(a)).

4. ‘Nationals of other States [...] shall comply with [...] laws and regulations’

23 When a coastal State does allocate fishing rights to other States in the EEZ, the Convention leaves no doubt that the coastal State maintains the right to regulate the foreign vessels fishing in its waters. In particular, Art. 62 (4) makes clear that nationals of other States must comply with the conservation measures adopted by the coastal State under Art. 61 and with ‘the other terms and conditions established in the laws and regulations of the coastal State’. The paragraph goes on to list a series of subjects which may be regulated by the coastal State, including licensing, quotas, and other specific regulations relating to fishing vessels and fishing gear.

24 The inclusion of the term ‘*inter alia*’ makes clear that this list is illustrative and coastal States may adopt other forms of law and regulations, provided they are consistent with the Convention. At the same time, the coastal States powers are not unlimited. As noted by the arbitral tribunal in the *Dispute Concerning Filleting in the Gulf of St Lawrence*, ‘although the list is not exhaustive, it does not appear that the regulatory authority of the coastal State normally includes the

⁵⁶ Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America, 2 April 1987, UNTS 2176, 93.

⁵⁷ Art. 3 (1) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

⁵⁸ Art. 2 (1) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

⁵⁹ Stephen Mbithi Mwikya, *Fisheries Access Agreements: Trade and Development Issues* (2006), 7.

⁶⁰ Art. 2 (2) Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States of America.

⁶¹ See Press Release from the US Department of State, 29 June 2016, available at <http://www.state.gov/r/pa/prs/ps/2016/06/259201.htm>

⁶² Mwikya (note 59), 8. For further information, see *supra*, MN 9.

authority to regulate subjects of a different nature than those described'.⁶³ In that case, there was a dispute concerning whether Canada could regulate the filleting of fish by French freezer trawlers in the Gulf of St Lawrence. The tribunal indicated that, in its opinion, 'the regulation of filleting at sea cannot a priori be justified by coastal State powers under the [UNCLOS]'.⁶⁴ This interpretation of the Convention has been criticized as being too restrictive by many commentators⁶⁵ and it arguably gives too little weight to the fact that the Convention permits a broad range of coastal State regulations including some regulations that do not relate directly to fishing activity itself, such as requiring that all or part of the catch is landed in the ports of the coastal State (→ Art. 62 (4)(h)). Nevertheless, the point that coastal State powers in the EEZ are not unlimited is undoubtedly correct (→ Art. 56). Indeed, more recent tribunals appear to have adopted a broader understanding of the right to regulate living resources in the EEZ. Drawing upon relevant State practice and international treaties, the International Tribunal for the Law of the Sea (ITLOS) confirmed in *The M/V 'Virginia G' Case* that the power to regulate fishing under Part V of the Convention extends to the regulation of bunkering of fishing vessels.⁶⁶

25 The precise terms and conditions attached to access will depend on the arrangements between the coastal State and the State requesting access. In some cases, such terms and conditions are negotiated between the two parties, whereas in other cases the terms and conditions are set unilaterally by the coastal State.⁶⁷ In the latter case, it may be against the requirement of good faith (→ Art. 300) if the coastal State's regulations in effect preclude other States from taking the surplus allocation. In other words, these requirements are expected to be reasonable and relate to legitimate conservation and management goals, taking into account alternative measures.⁶⁸

26 Art. 62 (4)(a) makes a particular reference to 'the payment of fees and other forms of remuneration' which makes it clear that a coastal State can demand compensation for the right to fish in its EEZ. Whilst the Convention mentions 'compensation in the field of financing, equipment and technology relating to the fishing industry' (→ Art. 62 (4)(a)), it is common practice for States to accept other forms of compensation that are not at all related to fishing.⁶⁹

27 A major problem has arisen with the enforcement of laws and regulations against foreign fishing vessels. Generally, a foreign fishing vessel which has been allowed access to resources within the EEZ is subject to the full authority of the coastal State, subject to some limitations set out

⁶³ *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), para. 52. See also Carl A. Fleischer, *The Exclusive Economic Zone under the Convention Regime and in State Practice*, in: Albert W. Koers/Bernard H. Oxman (eds.), *The 1982 Convention on the Law of the Sea* (1984), 241, 275: 'it seems reasonable to conclude that the regulatory powers of a coastal [S]tate cannot be unlimited. For example, it may not freely issue and enforce rules on the construction and equipment of foreign vessels that would make it impossible in practice to enjoy fishing rights existing under international law'. Nevertheless, Fleischer concludes that the regulatory authority of the coastal State is 'intended to be rather broad', *ibid.*, 276.

⁶⁴ *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), para. 52.

⁶⁵ Indeed, the dissenting arbitrator in the case found that '[t]here is no doubt that, in the absence of any agreement or arrangement to the contrary, the coastal State may regulate processing, including filleting', *Dispute Concerning Filleting within the Gulf of St Lawrence* (note 15), Dissenting Opinion of Donat Pharand, para. 17. See also Ted L. McDorman, *French Fishing Rights in Canadian Waters: The 1986 La Bretagne Arbitration*, *International Journal of Estuarine and Coastal Law* 4 (1989) 52, 58-59; William T. Burke, *Coastal State Fishery Regulation under International Law: A Comment on the La Bretagne Award of July 17, 1986*, *San Diego L Rev* 25 (1988), 495, 502-503.

⁶⁶ ITLOS, *The M/V 'Virginia G' Case* (Panama v. Guinea-Bissau), Judgment of 14 April 2014, para. 217, available at: <http://www.itlos.org/index.php?id=171>.

⁶⁷ See FAO Fish Resources Report (note 1), para. 11.

⁶⁸ Markowski (note 22), 142-146.

⁶⁹ See e.g. Attard (note 17), 173-174. He gives the interesting example of the 1974 Mauritania/Greece Fisheries Agreement under which Greek vessels had to pay a fee based on tonnage and the Greek government also agreed to build a hotel. See also Gerald Moore, *National Legislation for the Management of Fisheries under Extended Coastal State Jurisdiction*, *Journal of Maritime Law and Commerce* 11 (1980), 153.

in Art. 73.⁷⁰ Indeed, ‘in light of the special rights and responsibilities given to the coastal State in the [EEZ] under the Convention, the primary responsibility for taking the necessary measures to prevent, deter and eliminate [illegal, unreported and unregulated (IUU)] fishing rests with the coastal State.’⁷¹ In practice, however, many developing coastal States do not have the financial or technical resources to effectively enforce their law and regulations and IUU fishing by foreign vessels is a significant issue.⁷² In this regard, the EU’s fisheries access agreements have been criticised for the failure of EU vessels to observe third States’ fisheries legislation and applicable EU law.⁷³ While EU law on fisheries conservation applies to EU vessels fishing in third-State waters, including with regard to driftnets, shark finning and encircling of marine mammals with purse seine nets, it has been argued that in case of a conflict with the third State’s laws, the latter would prevail.⁷⁴ The vessels of other distant fishing nations have also been criticized for IUU fishing.⁷⁵ The Treaty on Fisheries between the Governments of Certain Pacific Island States and the Government of the United States expressly addresses this issue by specifically for continuing flag State responsibility. Art. 4 of that treaty provides that ‘the Government of the United States shall take the necessary steps to ensure that nationals and fishing vessels of the United States refrain from fishing in the Licensing Area and in waters closed to fishing pursuant to Annex I, except as authorized in accordance with Article 3’, including taking reasonable measures to assist the Pacific Island parties in investigations of any alleged breach of the treaty or bringing proceedings itself against the delinquent vessel.

28 The ITLOS recently confirmed that flag States retain some responsibility under the Convention for ensuring compliance by their vessels with the laws and regulations adopted by the coastal State. In its *SRFC Advisory Opinion*, delivered on 2 April 2015, the Tribunal held that

‘article 62, paragraph 4, of the Convention imposes an obligation on States to ensure that their nationals engaged in fishing activities within the exclusive economic zone of a coastal State comply with the conservation measures and with the other terms and conditions established in its laws and regulations.’⁷⁶

They clarified that this is a due diligence obligation, which requires the flag State to ‘take all necessary measures to ensure compliance and to prevent IUU fishing by fishing vessels flying its flag.’⁷⁷ The Tribunal identified a number of necessary measures, including ensuring that its vessels are properly marked, adopting legislation prohibiting its vessels from fishing in the EEZ of another state without authorization, and developing enforcement mechanisms to monitor and secure compliance with these laws, including sanctions that are ‘sufficient to deter violations and to deprive offenders of the benefits accruing from their IUU fishing activities.’⁷⁸ The explicit identification of this duty may go some way to addressing deficiencies in enforcement by the coastal State, but it is also necessary to work out precisely how the responsibilities of flag State interface with the responsibilities of the coastal State in this context.

⁷⁰ For further information, see *Harrison* on Art. 73.

⁷¹ ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 106, available at: <https://www.itlos.org/en/cases/list-of-cases/case-no-21/>.

⁷² See European Parliament Directorate-General for Internal Policies, *The Role of China in World Fisheries* (2012), 72-73.

⁷³ *Churchill/Owen* (note 28), 348-349.

⁷⁴ *Ibid.*, 332-333.

⁷⁵ See e.g. *The Role of China in World Fisheries* (note 72), 72-73.

⁷⁶ *SRFC Advisory Opinion* (note 71), para. 123.

⁷⁷ *Ibid.*, para. 129.

⁷⁸ *Ibid.*, para. 138. See also *The South China Sea Arbitration* (note 34), paras 740-744, supporting the existence of a due diligence obligation on flag states to control the activities of vessels flying their flag when fishing in the exclusive economic zone of another state. A closer reading reveals the Tribunal adopts a slightly different interpretation of Art. 62(4), which it finds ‘imposes an obligation directly on private parties engaged in fishing...’ (para. 741)

29 Art. 62 (5) requires the coastal State to give ‘due notice’ of conservation and management laws and regulations. It does not specify what form this due notice must take and it may presumably be satisfied by the publication of laws and regulations.⁷⁹

⁷⁹ The term ‘due notice’ is frequently used within the Convention, see e.g. → Arts. 51 (2), 60 (3), (5), 147 (2)(a).

Article 63

Stocks occurring within the exclusive economic zones of two or more coastal States or both within the exclusive economic zone and in an area beyond and adjacent to it

1. Where the same stock or stocks of associated species occur within the exclusive economic zones of two or more coastal States, these States shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary to coordinate and ensure the conservation and development of such stocks without prejudice to the other provisions of this Part.

2. Where the same stock or stocks of associated species occur both within the exclusive economic zone and in an area beyond and adjacent to the zone, the coastal State and the States fishing for such stocks in the adjacent area shall seek, either directly or through appropriate subregional or regional organizations, to agree upon the measures necessary for the conservation of these stocks in the adjacent area.

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I. Purpose and Function

1 Art. 63 singles out two groups of resources that do not occur exclusively within the exclusive economic zone (EEZ) of a single coastal State, namely transboundary stocks – that is stocks that occur within the EEZ of two or more coastal States and straddling stocks, i.e. stocks that occur both within the EEZ of the coastal State and in the adjacent high seas.¹ For these stocks, arrangements additional to the coastal State's measures (→ Art. 61) are required to ensure effective conservation and management.² Art. 63 sets out specific requirements concerning transboundary cooperation between coastal States, in relation to transboundary stocks, and between coastal and other States fishing straddling stocks in adjacent high seas. These obligations also apply to associated species. These obligations are considered 'part at least of the general principles of international law, if not of international custom'.³

2 Both provisions contained in Art. 63 create an obligation to enter into negotiations (*pacta de negotiando*) rather than an obligation to reach an agreement (*pacta de contrahendo*); thus they require coastal States to 'enter into negotiations in good faith, respond to genuine attempts at negotiations, and to be prepared to modify their original positions'.⁴ The International Tribunal for the Law of the Sea (ITLOS), classifying these as due diligence obligations, has also held that:

'the consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks'.⁵

Failure to comply could lead to international responsibility and it has been noted that:

'any dispute arising from the alleged failure to comply with the obligation under article 63, paragraph 1, of the Convention, unlike those disputes arising from the exercise of sovereign rights of the coastal State with respect to the living resources in its EEZ, can be submitted to the compulsory procedure under Part XV, section 2, of the Convention'.⁶

II. Historical Background

3 The problem of straddling fish stocks had already been recognized at UNCLOS I, and it received an innovative solution in the 1958 Convention on Fishing and the Conservation of the Living Resources of the High Seas (High Seas Fishing Convention). The High Seas Fishing

¹ Note that the Convention does not use these terms. However, see *David H. Anderson*, Straddling and Highly Migratory Fish Stocks, MPEPIL, para. 2, available at: <http://www.mpepil.com>. For a discussion of the difference between biological and legal concepts of stocks, as well as the inconsistent use of the term stock (as opposed to species) in the Convention and other relevant international agreements, see *Kaare Bangert*, Fish Stocks, MPEPIL, paras. 1-6, available at: <http://www.mpepil.com>.

² Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 641.

³ *Marion Markowski*, *The International Law of EEZ Fisheries* (2010), 55.

⁴ *Ellen Hey*, *The Regime for the Exploitation of Transboundary Marine Fisheries Resources* (1989), 116-118 and 158-159; *Markowski* (note 3), 51; Nordquist/Nandan/Rosenne (note 2), 646. See also ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 210 where the Tribunal says that this provision requires 'the States concerned to consult with one another in good faith, pursuant to article 300 of the Convention', available at: <https://www.itlos.org/en/cases/list-of-cases/case-no-21/> For further information on the concept of good faith, see *O'Brien* on Art. 300.

⁵ *SRFC Advisory Opinion* (note 4), para. 210.

⁶ *SRFC Advisory Opinion* (note 4), Separate Opinion of Judge Paik, para. 38.

Convention recognized that coastal States had a ‘special interest’ in the management of fish stocks in waters adjacent to their territorial sea⁷, and it provided that

‘any coastal State may, with a view to the maintenance of the productivity of the living resources of the sea, adopt unilateral measures of conservation appropriate to any stock of fish or other marine resources in any area of the high seas adjacent to its territorial sea, provided that negotiations to that effect with the other States concerned have not led to an agreement within six months.’⁸

Such unilateral measures were under the conditions laid down in Art. 7 (2) High Seas Fishing Convention binding on other member States. At the same time, the High Seas Fishing Convention established a special procedure whereby other States could challenge any unilateral measures adopted by a coastal State through a special commission.⁹ These provisions aimed to ensure an effective regime for the conservation of fish stocks in coastal waters and compatibility between measures taken by the coastal State and other fishing States. They were, however, highly controversial and the High Seas Fishing Convention received the lowest rate of acceptance amongst the instruments adopted at UNCLOS I.¹⁰

4 Even though States had agreed to extend the fisheries jurisdiction of coastal States at UNCLOS III,¹¹ the question of compatibility between conservation measures taken by coastal States and other fishing States still arose in the negotiations concerning the EEZ. At the 1972 session of the Sea-Bed Committee, a working paper was submitted by Canada suggesting that an appropriate management mechanism for ‘wide-ranging species’ could be an ‘international authority’.¹² The drafters then considered alternative approaches such as favoring close consultation between international institutions and coastal States or simply cooperation.¹³ A proposal to allow invoking the dispute settlement mechanism of the Convention to determine measures to be applied in adjacent areas for the conservation of straddling stocks where no agreement on such measures could be reached by parties concerned was eventually withdrawn at the eleventh session of UNCLOS III¹⁴ and States settled on a provision which simply required cooperation between relevant States. The result is, however, framed in vague and essentially hortatory language, and it has been characterized as part of the ‘unfinished agenda’ of the Convention.¹⁵ Indeed, UNCLOS has been supplemented by other instruments on this topic, notably the UN Fish Stocks Agreement (UNFSA).

III. Elements

1. ‘stocks [...] occur[ing] within the exclusive economic zone of two or more coastal States’

5 Art. 63 (1) creates an obligation for the coastal State to ‘seek to agree’ with other concerned coastal States upon necessary measures for the management of transboundary stocks. This entails that States must seek to adopt jointly or coordinate their conservation measures, jointly determine a total allowable catch (→ Art. 61) for these stocks and allocate the total allowable amongst themselves. In the absence of agreement, however, coastal States would seem to be able to set their own allowable catch in accordance with Art. 61. In light of Art. 300, States should do so in good faith and should exercise their rights in a manner which would not constitute an abuse of right. Yet, there is a danger that such unilateral action will nevertheless undermine the long-term sustainability

⁷ Art. 6 (1) High Seas Fishing Convention.

⁸ Art. 7 (1) High Seas Fishing Convention.

⁹ Arts. 7 (4) and 9 High Seas Fishing Convention.

¹⁰ See *Robin R. Churchill/Alan V. Lowe, The Law of the Sea* (3rd edn. 1999), 479-480 (Appendix 2, Table B).

¹¹ For further information, see *Proelss on Art. 56 MN XX*.

¹² Sea-Bed Committee, Management of the Living Resources of the Sea: Working Paper Submitted by the Delegation of Canada, UN Doc. A/AC.138/SC.II/L.8 (1972), 3 (para. d).

¹³ Nordquist/Nandan/Rosenne (note 2), 641-645.

¹⁴ *L. Dolliver M. Nelson, Exclusive Economic Zone, MPEPIL*, para. 55, available at: <http://www.mpepil.com>.

¹⁵ *Barbara Kwiatkowska, The High Seas Fisheries Regime: At a Point of No Return?*, IJMCL 8 (1993), 327; see also *David Freestone, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement*, in: Ellen Hey (ed.), *Developments in International Fisheries Law* (1999), 287, 291.

of a stock if the disagreement between the coastal States continues. The dispute between Iceland and Faroe Islands and the EU on the joint management of the stock of North East Atlantic mackerel¹⁶ provides a useful example: lack of agreement among coastal States is compounded by the setting of autonomous catch limits at very high levels that arguably posed a threat to the sustainability of the stock. As mackerel fisheries by Iceland and the Faroe islands are mostly carried out in their EEZs, they are not subject to the competence of the North East Atlantic Fisheries Commission, the regional fisheries management organization in charge of management of mackerel in international waters of the North-east Atlantic, and mackerel would not meet the criteria for listing under the Convention on International Trade in Endangered Species of Wild Fauna and Flora. The EU has been considering various options to persuade Iceland and Faroe Islands to cooperate.¹⁷ Following the adoption of trade sanctions by the EU, legal proceedings were initiated by the Faroe Islands under both the WTO Agreement and the Convention, but the litigation was subsequently terminated following a settlement by the parties.¹⁸

6 Within its own portion of total allowable catch, each State may regulate access to the fisheries for both nationals and third State vessels individually.¹⁹ Thus, coastal States retain their rights under Arts. 56, 61 and 62.²⁰ The reference to ‘development’ of these stocks emphasizes the possibility of exploiting little-used stocks more effectively and, read in conjunction with the requirements in Art. 61, points to the need for a long-term strategy of maintaining transboundary stocks as a viable resource.²¹ Indeed, ITLOS has stressed that the term ‘development’ as used in Art. 63 must be understood to mean that ‘these stocks should be used as fishery resources within the framework of a sustainable fisheries management regime,’ noting that this may include ‘more effective fisheries management schemes to ensure the long-term sustainability of exploited stocks’ but also stock restoration.²²

2. ‘stocks [...] occur[ing] both within the exclusive economic zone and in an area beyond and adjacent to the zone’

7 Art. 63 (2) creates a similar obligation to that in Art. 63 (1) for concerned coastal States and States fishing for straddling stocks in the adjacent high seas. The term straddling stocks is not used in Art. 63 (2), but it is a term that was first employed in Agenda 21 in its call for the negotiation of an implementing agreement²³ and it is used in the UNFSA, albeit without being concretely

¹⁶ For details of this dispute stretching back to 2010, see http://www.scottishpelagic.co.uk/news_views/mackerel_dispute.htm

¹⁷ European Commission, Impact Assessment Accompanying the Proposal for a Regulation of the European Parliament and of the Council on Certain Measures Directed to Non-Collaborating Countries for the Purpose of the Conservation of Fish Stocks, SEC(2011) 1576 final (2011). See also Commission Implementing Regulation (EU) No. 793/2013 of 20 August 2013, OJ 2013 L 223, 1, establishing measures in respect of the Faroe Islands to ensure the conservation of the Atlanto-Scandian herring stock.

¹⁸ See WTO, *European Union – Measures on Atlanto-Scandian Herring*, Joint Communication from Denmark in respect of the Faroe Islands and the European Union of 21 August 2014, WT/DS469/3; PCA (Arbitral Tribunal Constituted under Annex VII UNCLOS), *Atlanto-Scandian Herring Arbitration* (The Kingdom of Denmark in Respect of the Faroe Islands/European Union), Termination Order of 23 September 2014, available at: <http://www.pcacases.com/web/view/25>.

¹⁹ *Hey* (note 4), 55-56, 68 and 91; *Markowski* (note 3), 50-51; *L. Dolliver M. Nelson*, The Development of the Legal Regime of High Seas Fisheries, in: Alan Boyle/David Freestone (eds.), *International Law and Sustainable Development* (1999), 121.

²⁰ *David J. Attard*, *The Exclusive Economic Zone in International Law* (1987), 183.

²¹ Nordquist/Nandan/Rosenne (note 2), 647. *SRFC Advisory Opinion* (note 4), para. 198.

²² *SRFC Advisory Opinion* (note 4), para. 198.

²³ UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21), Ch. 17.45, 17.49.

defined.²⁴ The Food and Agriculture Organization (FAO) includes mackerel, squids and pollock among straddling stocks.²⁵

8 Under Art. 63 (1), States must ‘seek to agree’ on conservation measures. The result is that ‘the coastal State has a say over conservation in the area of the high seas adjacent to its EEZ, even if it does not fish there; and that fishing States’ freedom of fishing in that area is subject to the rights and interests of the coastal State, as is expressly confirmed in Art. 116 (b).’²⁶ This is justified by the fact that unrestrained fishing of straddling stocks in the high seas would render useless any measure adopted in the EEZ and vice versa.²⁷ Two elements, however, differentiate Art. 63 (2) from Art. 63 (1). First of all, the agreement on necessary measures only concerns the area beyond the EEZ, as no cooperative arrangement is expressly required for the whole range of the stocks.²⁸ Thus, the discretion of coastal States to adopt conservation and management measures within their own EEZ is not affected by this article. Second, the international obligation related to straddling stocks has been elaborated in the UNFSA.²⁹ Thus, for State parties to UNCLOS that are also parties to the UNFSA,³⁰ the obligation enshrined in Art. 63 (2) is complemented by the more specific requirements found in the UNFSA. Most of the provisions of the UNFSA are directed at fishing on the high seas for straddling (and highly migratory) stocks. However, several provisions are made specifically applicable to the EEZ, namely its general principles (Art. 5 UNFSA), the precautionary approach (Art. 6 UNFSA) and compatibility provisions (Art. 7 UNFSA).³¹ This results in ‘placing obligations on coastal States with regard to the conservation and management of such stocks within their EEZs’.³² It has thus been observed that ‘with regard to the management of straddling stocks within national jurisdiction, the [Fish Stocks] Agreement heightens the degree of obligation on the coastal state imposed by Article 61 of the Convention’.³³

9 The UNFSA expands upon the concepts used in UNCLOS by including more contemporary notions related to long-term sustainability of fish stocks, the protection of species within the same ecosystem; the prevention and elimination of overfishing and excess fishing capacity; minimizing pollution and discard; protection of marine biodiversity, and impact assessment.³⁴ In addition, Art. 7 UNFSA requires compatible management of fisheries within and beyond national jurisdiction, taking into account the conservation and management measures ‘adopted and applied’ by the coastal State and it requires States to ensure that measures established for the high seas do not undermine the effectiveness of such measures. On the other hand, States are to take into account previously agreed measures for relevant high seas areas, biological characteristics of the stocks and the relationships between the distribution of stocks, the fisheries and the geographical particularities of the region concerned, but also respective dependence on the stocks of concerned coastal and fishing States.³⁵ This provision has been interpreted as ‘requiring the coastal [S]tate to provide leadership in fisheries management by actually applying Article 61 principles within the EEZ

²⁴ Bangert (note 1), para. 6.

²⁵ Jean-Jacques Maguire et al., *The State of World Highly Migratory, Straddling and Other High Seas Fishery Resources and Associated Species*: FAO Fisheries Technical Paper 495 (2006). Cf. also Owen on Annex I.

²⁶ Anderson (note 1), para. 6.

²⁷ Nordquist/Nandan/Rosenne (note 2), 647.

²⁸ Attard (note 20), 184.

²⁹ Art. 7 (1)(a) UNFSA replicates Art. 63 (2) UNCLOS.

³⁰ At the time of writing the UNFSA counts 78 parties, with 2 parties (Iran and the US) not being party to UNCLOS, cf. the table elaborated by the UN DOALOS, available at: http://www.un.org/Depts/los/reference_files/status2010.pdf.

³¹ Art. 3 UNFSA.

³² Markowski (note 3), 17.

³³ Donna R. Christie, *The Conservation and Management of Stocks Located Solely within the Exclusive Economic Zone*, in: Hey (note 14), 395, 413.

³⁴ *Ibid.*, 414.

³⁵ Art. 7 (2) UNFSA; see also Moritaka Hayashi, *The Straddling and Highly Migratory Fish Stocks Agreement*, in: Hey (note 15), 51, 61-62.

before obligations for compatible exploitation can be imposed on high seas fisheries.³⁶ The obligations are coupled with the duty to inform other concerned States about the measures adopted for stocks concerned and to make every effort to reach a provisional arrangement pending the agreement on compatible measures.³⁷ The FAO Code of Conduct for Responsible Fisheries,³⁸ as a non legally-binding instrument that offers principles and standards applicable to the conservation, management and development of all fisheries including within the EEZ, thus providing a framework for national and international efforts³⁹ in the implementation of Art. 63 of the Convention, calls for compatibility of conservation and management measures for transboundary and straddling fish stocks to be achieved in a manner consistent with the rights, competences and interests of the States concerned.⁴⁰

10 Besides applying directly to its parties, it can also be argued that the UNFSA can be used as a subsequent agreement to inform the interpretation of UNCLOS in accordance with Art. 31 (3) of the Vienna Convention on the Law of Treaties.⁴¹ However, the ability to use the UNFSA as an interpretative agreement depends on there being particular words in UNCLOS that require interpretation; it would not allow new obligations to be imposed on States Parties without some connection to the original wording of the Convention.⁴² In addition, it would be necessary for UNCLOS parties to agree that the interpretation coloured by the UNFSA would not ‘prejudice’ their rights, jurisdiction and duties under the Convention, as required by Art. 4 UNFSA. It is also possible that certain obligations in the UNFSA have become customary international law and are therefore binding on States Parties to UNCLOS in that way, whether or not they are a party to the UNFSA itself. This argument may apply to the general obligations to pursue an ecosystem approach and a precautionary approach.⁴³ Indeed, many of the general principles found in the UNFSA are today reflected in other international fisheries instruments which suggests that they have received a degree of acceptance amongst the international community.⁴⁴ At the same time, some rules in the UNFSA are clearly intended to apply only to the parties. This is true of the provisions on enforcement and dispute settlement in Arts. 21 and 27-32 UNFSA respectively which are expressed as obligations for the ‘States Parties’ and they are therefore less likely to have influenced customary international law.

3. ‘associated species’

13 Art. 63 also makes reference to stocks that are ‘associated’⁴⁵ with transboundary or straddling stocks. The expression is broad and does not clarify the intensity of the link or causal relation between target species and associated species, or whether the relationship is to be determined exclusively on the basis of biological criteria, or also economic and legal ones.⁴⁶ Given that the expression is also used in the UNFSA, it has been argued that it should be interpreted in light of the precautionary approach and the international obligation to conserve biodiversity, with a

³⁶ *Christie* (note 33), 414.

³⁷ Arts. 7 (5) and 7 (7)-(8) UNFSA; *Hayashi* (note 35), 61-62.

³⁸ FAO, Code of Conduct on Responsible Fisheries (1995).

³⁹ Preamble FAO Code of Conduct.

⁴⁰ Art. 7.3.2 FAO Code of Conduct.

⁴¹ *Freestone* (note 15), 313.

⁴² *Tore Henriksen*, Revisiting the Freedom of Fishing and Legal Obligations of States not Party to Regional Fisheries Management Organizations, ODIL 40 (2009), 80, 81; *James Harrison*, Making the Law of the Sea (2011), 108.

⁴³ For further information on the ecosystem and the precautionary approach within UNCLOS, *cf. Harrison/Morgera* on Art. 61 and *Czybulka* on Art. 194.

⁴⁴ See further *Harrison* (note 42), 108-113. See also *Erik Franckx*, Pacta Tertiis and the Agreement for the Implementation of the Straddling and Highly Migratory Fish Stocks Provisions of the United Nations Convention on the Law of the Sea, Tulane Journal of International and Comparative Law 8 (2000), 49-81.

⁴⁵ In similar contexts this term can also be found in Arts. 61 (4) and Art. 119 (1)(b).

⁴⁶ *Bangert* (note 1), para. 7.

view to underlining the need for integrated management based on an ecosystem approach.⁴⁷ This is certainly the correct interpretation in light of the obligations arising from the Convention on Biological Diversity and international standards on the ecosystem approach.

4. ‘States shall seek, either directly or through appropriate [...] organizations, to agree upon the measures necessary for the conversation’

14 Two options are envisaged to ensure cooperation in relation to transboundary and straddling stocks: States can cooperate directly among themselves, or they can do so through subregional or regional organizations.⁴⁸ While the Convention does not express a preference for either form of cooperation, the FAO Code of Conduct encourages States concerned in the case of straddling stocks to cooperate ‘where appropriate, through the establishment of a bilateral, subregional or regional fisheries organization or arrangement’.⁴⁹ Moreover, the UNFSA provides that

‘[w]here a subregional or regional fisheries management organization or arrangement has the competence to establish conservation and management measures for particular straddling fish stocks or highly migratory fish stocks, States fishing for the stocks on the high seas and relevant coastal States shall **give effect to their duty to cooperate** by becoming members of such organization or participants in such arrangement, or by agreeing to apply the conservation and management measures established by such organization or arrangement.’⁵⁰

In addition, the UNFSA encourages States to establish regional fisheries management organizations or arrangements where they do not already exist.⁵¹ Overall, relevant international instruments fall short of creating an obligation to establish regional fisheries bodies for straddling stocks,⁵² although in practice they have led to the modification of pre-existing regional arrangements and the creation of new ones.⁵³

15 UNCLOS provides no information on the specific goals of cooperation. However, this is another area in which the UNFSA fills in gaps by identifying the issues which should be regulated by subregional and regional fisheries management organizations and arrangements.⁵⁴ In practice, the principles in the UNFSA have been broadly taken into account by States when establishing new subregional or regional fisheries organizations, or in adapting existing organizations which have competence to manage straddling fish stocks.⁵⁵ It should be finally noted that ITLOS emphasized the need to seek the cooperation also of States that are not members of a regional organization but share the same stocks, directly or through appropriate international organizations, in order to ensure the effectiveness of conservation and sustainable management of these stocks in the whole of their geographic distribution or migrating area.⁵⁶

⁴⁷ *Ibid.* See Harrison/Morgera on Art. 61 MN 19.

⁴⁸ For examples, see discussion in Robin R. Churchill, ‘Managing Straddling Fish Stocks in the North-East Atlantic: A Multiplicity of Instruments and Regime Linkages – but how effective a management?’, in Olav Schram Stokke (ed.), *Governing High Seas Fisheries: The Interplay of Global and Regional Regimes* (2001) 235-272.

⁴⁹ Art. 7.1.3 FAO Code of Conduct.

⁵⁰ Art. 8 (3) UNFSA (emphasis added).

⁵¹ Art. 8 (5) UNFSA.

⁵² Hayashi (note 35), 67.

⁵³ See Kaare Bangert, *Fisheries Agreements*, MPEPIL, available at: <http://www.mpepil.com>.

⁵⁴ Arts. 9-10 UNFSA.

⁵⁵ See e.g., Secretary-General, *The Status and Implementation of the Agreement for the Implementation of the Provisions of the United Nations Convention for the Law of the Sea of 10 December 1982 Relating to the Conservation and Management of Straddling Fish Stocks and Highly Migratory Fish Stocks (the Fish Stocks Agreement) and Its Impact on Related or Proposed Instruments Throughout the United Nations System, with Special Reference to Implementation of Part VII of the Fish Stocks Agreement, Dealing With the Requirements of Developing States*, UN Doc. A/58/215 (2003).

⁵⁶ *SRFC Advisory Opinion* (note 4), paras. 215 and 218.

Article 64

Highly migratory species

1. The coastal State and other States whose nationals fish in the region for the highly migratory species listed in Annex I shall cooperate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone. In regions for which no appropriate international organization exists, the coastal State and other States whose nationals harvest these species in the region shall cooperate to establish such an organization and participate in its work.
2. The provisions of paragraph 1 apply in addition to the other provisions of this Part.

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I. Purpose and Function

1 Highly migratory species comprise tuna, marlin, swordfish, sharks and some other species of marine mammals. They raise specific concerns in the context of exclusive economic zone (EEZ) fisheries as their conservation and management is ‘difficult without international agreement’.¹ Thus, Art. 64 mandates cooperation between coastal States and other States fishing highly migratory species. The provision applies to the discrete list of species listed in Annex I which includes many

¹ David J. Attard, *The Exclusive Economic Zone in International Law* (1987), 184; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), *United Nations Convention on the Law of the Sea 1982: A Commentary*, vol. II (1993), 649.

highly commercially valuable species such as tuna, swordfish and marlin.²

2 Compared to Art. 63, Art. 64 creates a notably stronger obligation to cooperate, albeit it does not go as far as requiring States to reach agreement.³ It does not just require States to enter into negotiations, rather it requires that they engage in the coordinated or joint determination and allocation of the total allowable catch for highly migratory species, inclusive of the catch taken within the EEZ. As noted by the International Tribunal for the Law of the Sea, States must ‘consult with one another in good faith’ and ‘the consultations should be meaningful in the sense that substantial effort should be made by all States concerned, with a view to adopting effective measures necessary to coordinate and ensure the conservation and development of shared stocks.’⁴ However, if agreement cannot be reached, Art. 64 does not impede coastal States from exercising their sole right to determine the conditions under which fishing may take place, enforcement responsibilities and the control over research and data collection.⁵ Without derogating from the rights of the coastal States to regulate and manage highly migratory species within its EEZ, Art. 64 nevertheless implies that these unilateral decisions cannot be taken *only* in consideration of the coastal State’s interests.⁶ In the *Southern Bluefin Tuna Cases*, for instance, New Zealand and Australia alleged that Japan had failed to comply with its obligation to cooperate in the conservation of the southern bluefin tuna stock by, *inter alia*, failing in good faith to cooperate with New Zealand and Australia with a view to ensuring the conservation of the stocks in accordance with Art. 64.⁷ In prescribing provisional measures in the case, the International Tribunal for the Law of the Sea concluded that ‘Australia, Japan and New Zealand should resume negotiations without delay *with a view to reaching agreement* on measures for the conservation and management of southern bluefin tuna.’⁸

3 The interpretation of this provision needs to take into account several successive developments, such as the UN Fish Stocks Agreement (UNFSA), the creation of Regional Fisheries Management Organizations (RFMOs) and the relevance of multilateral environmental agreements.

II. Historical Background

4 Given that coastal States only had limited jurisdiction over fishing prior to the development of the EEZ, highly migratory species had not arisen in international negotiations as a distinct issue up until that time. However, given the economic importance of many highly migratory stocks for distant water fishing fleets, controversy surrounded the question as to whether highly migratory species should fall under the EEZ regime during discussions at UNCLOS III. At the 1971 session of the Sea-Bed Committee, the United States proposed empowering international fisheries organizations to regulate living resources including ‘highly migratory oceanic stocks’.⁹ Debates ensued as to the degree to which international fisheries organizations would be responsible for managing such species or whether States should rather regulate these stocks in agreement or consultation with relevant international organizations.¹⁰ Eventually, the proposals to require cooperation only through international organizations were not accepted and Art. 64 allows both bilateral cooperation and

² For a comprehensive analysis, see *Owen* on Annex I. One study valued the tuna industry at US\$ 42.21 billion; see Pew Charitable Trusts, *Netting Billions: A Global Valuation of Tuna* (2016).

³ The Permanent Court of International Justice stated that ‘an obligation to negotiate does not imply an obligation to reach agreement’, PCIJ, *Railway Traffic between Lithuania and Poland*, Advisory Opinion of 15 October 1931, PCIJ Series A/B 108, 116.

⁴ ITLOS, *Request for an Advisory Opinion Submitted by the Sub-Regional Fisheries Commission (SRFC)*, Advisory Opinion of 2 April 2015, para. 210, available at: <https://www.itlos.org/en/cases/list-of-cases/case-no-21>.

⁵ *Marion Markowski*, *The International Law of EEZ Fisheries* (2010), 51.

⁶ *Attard* (note 1), 186.

⁷ ITLOS, *Southern Bluefin Tuna Cases* (New Zealand v. Japan; Australia v. Japan), Provisional Measures, Order of 27 August 1999, ITLOS Reports (1999), 280, paras. 28 (i)(d), 29 (1)(d).

⁸ *Ibid.*, para. 90 (1)(e) (emphasis added).

⁹ Nordquist/Nandan/Rosenne (note 1), 650. For a detailed analysis of the US proposal, see *Owen* on Annex I MN 3 *et seq.*

¹⁰ Nordquist/Nandan/Rosenne (note 1), 650-656.

cooperation through international organizations to be pursued at the same time, as it also allows for cooperation through more than one mechanism for the same fishery.¹¹ A proposal to include an obligation to adopt conservation measures within the EEZ that are no less effective than international standards was unsuccessful.¹²

5 In its final form, Art. 64 (2) makes clear that other provisions on EEZ fisheries are applicable to highly migratory species, and therefore ‘confirms the sovereign rights of coastal states to manage highly migratory species in their EEZ’.¹³ Nowadays ‘the large majority of States claim jurisdiction over all EEZ living resources including highly migratory species.’¹⁴

III. Elements

1. ‘highly migratory species listed in Annex I’

6 Art. 64 applies to those species listed in Annex I of the Convention. The reference to Annex I, entitled ‘Highly Migratory Species’, is however problematic. First of all, the Convention does not contain any provision for its adjustment in light of increased knowledge, beyond the normal, somewhat cumbersome, amendment procedures.¹⁵ Second, some of the species listed in Annex I would also fall within the scope of other provisions in Part V. This is particularly problematic for cetaceans, as Annex I contains ‘some but not all cetaceans’ which are specifically addressed by Art. 65.¹⁶ It has been argued, therefore, that when Art. 64 applies to the cetaceans listed in Annex I in the EEZ, it operates as *lex generalis*, while Art. 65 is a *lex specialis* which enables coastal States or international organizations to prohibit, limit or regulate marine mammals more strictly than Art. 64 would otherwise allow.¹⁷

2. ‘shall co-operate [...] with a view to ensuring conservation and promoting the objective of optimum utilization’

7 Art. 64 obliges cooperation towards the conservation and optimum utilization of highly migratory species, to the extent possible throughout their range, both within and beyond the EEZ.¹⁸ The reference to the dual goal of ensuring conservation and promoting optimum utilization reflects Arts. 61 (2) and 62 (1) in framing the management of highly migratory species as an economic resource.¹⁹ It has thus been noted that Art. 64 does not override the provisions of Arts. 56, 61-62 of the Convention,²⁰ leading to the criticism that it ‘does not go far enough in promoting its goals’ and

¹¹ *Ibid.*, 657.

¹² Second Committee UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), OR III, 222, 223-224 (Article 19): ‘Fishing for highly migratory species listed in the annex within the economic zone shall be regulated by the coastal States, and beyond the economic zone by the State of nationality of the vessel, in accordance with regulations established by appropriate international or regional fishing organizations pursuant to this article.’ See also *John W. Kindt*, The Law of the Sea: Anadromous and Catadromous Fish Stocks, Sedentary Species, and the Highly Migratory Species, *SJILC* 11 (1984), 9, 22-23.

¹³ *Patricia W. Birnie*, Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling, in: David Freestone/Richard Barnes/David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 261, 273.

¹⁴ *Attard* (note 1), 186.

¹⁵ *David H. Anderson*, Straddling and Highly Migratory Fish Stocks, *MPEPIL*, para. 7, available at: <http://www.mpepil.com>. For further information, cf. *Owen* on Annex I.

¹⁶ *Birnie* (note 13), 263. See also *Owen* on Annex I MN XX.

¹⁷ *Birnie* (note 13), 274; *Nordquist/Nandan/Rosenne* (note 1), 664.

¹⁸ *David Freestone*, Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement, in: *Ellen Hey* (ed.), *Developments in International Fisheries Law* (1999), 287, 302; *Nordquist/Nandan/Rosenne* (note 1), 657.

¹⁹ *Nordquist/Nandan/Rosenne* (note 1), 657.

²⁰ *L. Dolliver M. Nelson*, Exclusive Economic Zone, *MPEPIL*, para. 57, available at: <http://www.mpepil.com>. For further information, cf. *Owen* on Annex I MN XX.

is ultimately seen as treating highly migratory species no differently from others subject to Part V of the Convention.²¹

8 It has been argued that in light of the widespread acceptance of the obligations contained in Art. 64 as reflected in State practice, these obligations are considered a shared responsibility among coastal States and States fishing highly migratory species and may be considered ‘part at least of the general principles of international law, if not of international custom’.²²

9 As has been observed in relation to Art. 63 (2), the international obligation related to highly migratory stocks has been elaborated in the UNFSA: for States Parties to UNCLOS that also are parties to the UNFSA, the obligation enshrined in Art. 64 is thus complemented by the more specific requirements found in the UNFSA that are made specifically applicable to the EEZ, namely its general principles (Art. 5 UNFSA), the precautionary approach (Art. 6 UNFSA) and compatibility provisions (Art. 7 UNFSA).²³ Moreover, the UNFSA provides specific details concerning the issues which should be regulated by subregional and regional fisheries management organizations and arrangements responsible for highly migratory stocks.²⁴

3. ‘directly or through appropriate international organizations’

10 Although Art. 64 leaves it open to relevant States whether to cooperate directly or through international organizations, it expresses preference for the latter option by encouraging States to cooperate to establish such organizations in regions where they do not exist.²⁵ Several RFMOs deal with highly migratory species, in particular tuna: Inter-American Tropical Tuna Commission, International Commission for the Conservation of Atlantic Tuna (ICCAT), Indian Ocean Tuna Commission, Western Indian Ocean Tuna Organization and the Commission for the Conservation of the Southern Bluefin Tuna.²⁶ To provide an example, ICCAT is tasked with carrying out studies of the populations of tuna and tuna-like fishes and such other species of fishes exploited in tuna fishing in the Convention area as are not under investigation by another international fishery organization, and making recommendations designed to maintain the populations of tuna and tuna-like fishes that may be taken in the Convention area at levels which will permit the maximum sustainable catch.²⁷ The most recent Western and Central Pacific Fisheries Commission, which was created in 2004, is tasked to ‘to ensure, through effective management, the long-term conservation and sustainable use of highly migratory fish stocks in the western and central Pacific Ocean in accordance with the 1982 Convention and the Agreement’.²⁸ According to a Food and Agriculture (FAO) study:

‘The tuna RFMOs use similar processes to develop and agree on conservation and management measures. They collect or assemble data about the fisheries, carry out a scientific assessment of the state of the stocks, using either dedicated scientific experts or a committee of scientists drawn from members and cooperating participants, or some combination of those arrangements. The best scientific advice is presented to their governing commission, which then develops any management measures it believes necessary in the light of the scientific advice and other relevant factors [...]. [Their] rather unwieldy decision-making processes tend to result in lowest common denominator decisions rather than producing forward-looking and precautionary conservation and management measures.’²⁹

11 Following the adoption and entry into force of the UNFSA, several RFMOs have reviewed

²¹ *Kindt* (note 12), 21.

²² *Markowski* (note 5), 55.

²³ Art. 3 UNFSA.

²⁴ Arts. 9-10 UNFSA. See also *Harrison/Morgera* on Art. 63 and *Owen* on Annex I.

²⁵ *Markowski* (note 5), 52.

²⁶ *Nelson* (note 20), para. 56.

²⁷ Arts. IV, VII International Convention for the Conservation of Atlantic Tunas, 14 May 1966, UNTS 673, 63.

²⁸ Art. II Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean, 5 September 2000, UNTS 2275, 43.

²⁹ *Robin Allen*, International Management of Tuna Fisheries: Arrangements, Challenges and Ways Forward, FAO Fisheries and Aquaculture Technical Paper 536 (2010), 8.

their performance. A recent FAO study, however, concludes that the UNFSA, the precautionary approach and the setting of limit points, ‘seem to have had little effect on management by the tuna RFMOs’.³⁰ Accordingly, the General Assembly continues to highlight the persistent need to carry out and publish the results of such reviews for all RFMOs, as well as the more general need for RFMOs to modernize their mandates to fully incorporate the precautionary and ecosystem approaches to fisheries management and biodiversity considerations, including the conservation and management of ecologically related and dependent species and protection of their habitat; and improve transparency through the development of transparent criteria for the allocation of fishing opportunities.³¹ At the 2012 UN Conference on Sustainable Development, governments agreed on ‘the need for transparency and accountability in fisheries management by regional fisheries management organizations’, as well as the need for RFMOs not only to regularly undertake independent performance reviews, but also to strengthen the comprehensiveness of those reviews, to make their results publicly available, and to implement their recommendations.³²

12 RFMOs have also engaged in wider coordination among themselves: notably, the tuna-related organizations have convened joint meetings since 2007³³ and adopted Course of Actions with a view to addressing jointly the excessive global fishing capacity for tunas.³⁴ Nonetheless, the performance of RFMOs remains a cause of concern, and has motivated a proposal to list Atlantic Bluefin Tuna under Appendix I³⁵ of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) which would have had the effect of prohibiting commercial trade in that fish. Whilst the proposal was unsuccessful, it brought to the attention of the international community the continued inadequacy of the management by the ICCAT and the possibility of resorting to other international instruments to address such inadequacy.³⁶ As a follow-up to the failed proposal, the Secretariats of CITES and ICCAT are elaborating guidelines for cooperation.³⁷

4. Sharks as an Example of Highly Migratory Species Listed in Annex I

13 Annex I includes certain ‘oceanic sharks’ amongst the highly migratory fish stocks regulated by Art. 64. Several recent international instruments have focused on sharks, because of their close stock-recruitment relationship, long recovery times in response to over-fishing and complex spatial structures (size/sex segregation and seasonal migration), providing evidence of State practice complying with the obligation enshrined in Art. 64 of cooperating through appropriate international organizations. In 1999 the FAO adopted an International Plan of Action (IPOA) for the Conservation

³⁰ *Ibid.*, 30.

³¹ GA Res. 65/38 of 7 December 2010, paras. 107-108, 99 and 105.

³² UN Conference on Sustainable Development, *The Future We Want*, UN Doc. A/CONF.216/L.1 (2012), 32 (para 172).

³³ First global summit of Tuna RFMOs was held in Kobe, Japan, January 2007. For further information, see <http://www.tuna-org.org/>.

³⁴ The first global summit adopted a Course of Actions with recommendations to standardize the presentation of stock assessments and to base management decisions upon the scientific advice, including the application of the precautionary and ecosystem-based approach leading to the establishment of measures to minimize the adverse effect of fishing for highly migratory fish species on ecologically related species, particularly sea turtles, seabirds and sharks, taking into account the characteristics of each ecosystem and technologies used to minimize adverse effect., see Joint Meeting of Tuna Regional Fisheries Organizations, Report of the Joint Meeting of Tuna RFMOs (2007), Appendix 14 (TunaRFMOs2007/16). The second Joint Tuna RFMOs Meeting, San Sebastian, 2009, adopted a follow-up Course of Actions: Joint Meeting of Tuna Regional Fisheries Organizations, Report of the Second Joint Meeting of Tuna Regional Fisheries Management Organizations (RFMOs) (2009). This was acknowledged by the General Assembly, which encouraged continued implementation, see GA Res. 65/38 of 7 December 2010, paras. 102-103. See generally, *Anderson* (note 15), para. 21.

³⁵ COP CITES, Fifteenth Meeting of the Conference of the Parties: Interpretation and Implementation of the Convention: Species Trade and Conservation, COP15 Doc. 52 (Rev. 1) (2010).

³⁶ *Renee Martin-Nagle*, Current Legal Developments: Convention on Trade in Endangered Species, *IJMC* 25 (2010), 609.

³⁷ Standing Committee CITES, Sixty-Second Meeting of the Standing Committee: Strategic Matters: Cooperation with Other Organization, SC62 Doc. 14.6 (2012), Annex (Guidelines for Cooperation Between The International Commission For the Conservation of Atlantic Tunas (ICCAT) and The Conference of The Parties to the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)).

and Management of Sharks, aimed at ensuring their long-term sustainable use.³⁸ The IPOA, which is voluntary in nature, applies to States in the waters of which sharks are caught by their own or foreign vessels, thereby including the EEZ, and to States the vessels of which catch sharks on the high seas. It calls upon States to develop, implement and monitor a national plan of action for conservation and management of shark stocks.³⁹ Where transboundary, straddling, highly migratory and high seas stocks of sharks are exploited by two or more States, the States concerned should strive to ensure effective conservation and management of the stocks, including through the adoption of regional or sub-regional plans.⁴⁰ The General Assembly has called upon States and RFMOs to urgently adopt measures to implement the IPOA.⁴¹ More recently it has called upon States to take immediate and concerted action to improve implementation of and compliance with regional arrangements and national measures regulating shark fisheries and incidental catch of sharks, in particular those prohibiting fisheries conducted for the sole purpose of harvesting shark fins, as well as upon RFMOs to take precautionary conservation and management measures for sharks taken in fisheries.⁴² Certain States have taken legislative action to ban shark-finning.⁴³

14 Environmental treaties also regulate some species of shark, thus confirming that the relevant treaty bodies can operate as ‘appropriate international organizations’ for the purposes of Art. 64. The parties to CITES, which includes *Cetorhinus maximus* (Basking shark), *Rhincodon typus* (Whale shark) and *Carcharodon carcharias* (Great white shark) in Appendix II CITES, urged FAO to take steps to actively encourage relevant States to develop national plans and encouraged parties to report directly to the CITES Secretariat on the implementation of national and regional plans.⁴⁴ In parallel, under the Convention on the Conservation of Migratory Species of Wild Animals (CMS), a Memorandum of Understanding (MoU) on the Conservation of Migratory Sharks was concluded in 2010,⁴⁵ covering seven shark species listed on the CMS Appendices: Basking Shark, Great White Shark, Whale Shark, Shortfin and Longfin Mako Shark, Porbeagle and Northern hemisphere populations of the Spiny Dogfish. The CMS MoU aims to achieve and maintain a favourable conservation status for migratory sharks based on the best available scientific information, taking into account the socio-economic and other values of these species for the people of the signatories, through the application of the precautionary and ecosystem-based approach and with the ‘fullest possible cooperation’ among governments, intergovernmental organizations, nongovernmental organizations, stakeholders of the fishing industry and local communities.

³⁸ FAO, International Plan of Action for the Conservation and Management of Sharks, International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries, International Plan of Action for the Management of Fishing Capacity (1999). For further information, see *Erika Techera/Natalie Klein*, Fragmented Governance: Reconciling Legal Strategies for Shark Conservation and Management, *Marine Policy* 35 (2011), 73; *Holly Edwards*, When Predators Become Prey: The Need for International Shark Conservation, *OCLJ* 12 (2007), 305; *Margaret Young*, Protecting Endangered Marine Species: Collaboration between the Food and Agriculture Organization and the CITES Regime, *Melb. J. Int’l L.* 11 (2010), 441.

³⁹ *Allen* (note 29), 11, 13-14 (paras. 17-24).

⁴⁰ *Ibid.*, 14-15 (paras. 25-26).

⁴¹ GA Res. 61/105 of 8 December 2006, para. 10.

⁴² GA Res. 65/38 of 7 December 2010, paras. 13-15.

⁴³ E.g. Central America Fisheries and Aquaculture Organization, Regulation OSP-05-11 to Ban the Practice of Shark Finning in the States Parties of SICA of November 2011, which is legally binding upon domestic and foreign vessels that catch and land sharks in areas under the jurisdiction of Belize, Costa Rica, Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua and Panama, as well as to vessels fishing in international waters that fly the flag of these countries.

⁴⁴ COP CITES, Conservation and Management of Sharks (Class Chondrichthyes), Resolution Conf. 12.6 (Rev. CoP15) (2010), available at: <http://www.cites.org/eng/res/12/12-06R15.php>. *Sonja Fordham/Coby Dolan*, A Case Study in International Shark Conservation: The Convention on International Trade in Endangered Species and the Spiny Dogfish, *Golden Gate University Law Review* 34 (2004), 531-571.

⁴⁵ UNEP/CMS, Memorandum of Understanding on the Conservation of Migratory Sharks, 12 February 2010, available at http://www.cms.int/species/sharks/MoU/Migratory_Shark_MoU_Eng.pdf.

Article 65

Marine mammals

Nothing in this Part restricts the right of a coastal State or the competence of an international organization, as appropriate, to prohibit, limit or regulate the exploitation of marine mammals more strictly than provided for in this Part. States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study.

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I. Purpose and Function

1 There are around 120 species of marine mammals including cetaceans (whales, dolphins and porpoises), pinnipeds (seals and walrus) and sirenians (dugong).¹ Art. 65 singles out marine mammals for special treatment because of their exceptional vulnerability to capture and adverse effects of other human interference, their highly migratory nature², and their interest both from economic, aboriginal use and conservation viewpoints.³ UNCLOS empowers States to give particular consideration to marine mammals in the context of the exclusive economic zone (EEZ) fisheries and subject them to a stricter management regime that is provided by Arts. 61-62.⁴ In avoiding reference to ‘utilization’, the Convention allows the prohibition or limitation of the exploitation of marine mammals,⁵ although it does not *require* States to adopt stricter regulation.⁶

2 Art. 65 represents an attempt to address the problems that had emerged in the negotiation and implementation of previous agreements seeking to prevent the over-exploitation of marine mammals, and in particular cetaceans: thus, in allowing coastal States and competent international organizations

¹ Donald R. Rothwell/Tim Stephens, *The International Law of the Sea* (2010), 308.

² See for information on the relationship between Arts. 64 and 65 also *Harrison/Morgera* on Art. 64 MN 6.

³ Patricia W. Birnie, *Marine Mammals: Exploiting the Ambiguities of Article 65 of the Convention on the Law of the Sea and Related Provisions: Practice under the International Convention for the Regulation of Whaling*, in: David Freestone/Richard Barnes/David M. Ong (eds.), *The Law of the Sea: Progress and Prospects* (2006), 261, 264.

⁴ *Ibid.*, 274.

⁵ David Freestone, *Implementing Precaution Cautiously: The Precautionary Approach in the Straddling and Highly Migratory Fish Stocks Agreement*, in: Ellen Hey (ed.), *Developments in International Fisheries Law* (1999), 287, 302 (footnote 62); David J. Attard, *The Exclusive Economic Zone in International Law* (1987), 189.

⁶ Alexander Proelss, *Marine Mammals*, MPEPIL, para.13, available at: <http://www.mpepil.com>.

to develop stricter measures to conserve marine mammals, it preserves the central role played in this endeavour by various international bodies.⁷

3 Art. 65 includes a competency clause relating to marine mammals within the EEZ, and a cooperation clause, which applies to all marine mammals but which specifically mentions cetaceans.⁸ The cooperation clause, which is repeated verbatim in Ch. 17 of Agenda 21,⁹ is considered part of customary international law.¹⁰ The application of Art. 65 is extended to the high seas by virtue of Art. 120.

II. Historical Background

4 The *Bering Fur Seal Arbitration* of 1893¹¹ is considered the ‘origins of the legal rules relevant to the conservation and management of marine mammals’, as it concerned the legality of pelagic sealing beyond the territorial sea.¹² The arbitral tribunal recognised the need for the protection of fur seals, even if it did not find that the United States had exclusive jurisdiction over the fur seals in the Bering Sea outside its territorial waters. The tribunal thus adopted a series of regulations aimed at the protection of fur seals, including a no-sealing zone, an annual closed season, a licensing system for vessels engaged in pelagic sealing, a prohibition on using certain fishing gear and an exception for aboriginal sealing.¹³ Following the decision, a regional convention was concluded for the protection of seals. The 1911 Convention between the United States, Great Britain, Russia and Japan for the Preservation for the Preservation and Protection of Fur Seals and Sea Otters in the North Pacific Ocean¹⁴ was eventually substituted by the 1957 Interim Convention on Conservation of North Pacific Fur Seals¹⁵ and the Protocol amending and extending the Interim Convention on Conservation of North Pacific Fur Seals of 1976¹⁶. Similar treaties were adopted to address the conservation and management of seal populations in other parts of the world, notably the 1972 Convention for the Conservation of Antarctic Seals.

5 Another category of marine mammals subject to early regulation was cetaceans. Whales have been exploited by mankind for many centuries as a source of food and more importantly oil. The first industrial whaling is thought to have started in Europe in the eleventh or twelfth centuries but by the nineteenth century, the whaling industry had extended its operations around the world.¹⁷ The first global instrument for the management of cetaceans was the 1931 Convention on the Regulation of Whaling,¹⁸ which was succeeded by the 1937 International Agreement for the Regulation of Whaling of 1937¹⁹ and the 1946 International Convention for the Regulation of Whaling (ICRW). It should be further noted that the 1958 Convention on the High Seas and the Convention on Fishing and Conservation of the Living Resources of the High Seas did not deal specifically with marine mammals.

6 Against this background, the special conservation and regulatory needs of marine mammals were discussed at UNCLOS III under the ‘strong pressure applied by environmental groups backed by

⁷ Birnie (note 3), 262.

⁸ Ted McDorman, Canada and Whaling: An Analysis of Article 65 of the Law of the Sea Convention, ODIL 29 29 (1998), 179, 181-182.

⁹ UNCED, Report of the United Nations Conference on the Environment and Development, UN Doc. A.CONF/151/26/REV.1 (Vol. I) (1992), 9 (Agenda 21).

¹⁰ McDorman (note 8), 187.

¹¹ *Award between the United States and the United Kingdom, Relating to the Rights of Jurisdiction of United States in the Bering's Sea and the Preservation of Fur Seals* (United States v. United Kingdom), Decision of 15 August 1893, RIAA XXVIII, 263.

¹² Proelss (note 6), paras. 5-8.

¹³ *Bering Fur Seal Arbitration* (note 11), 263.

¹⁴ Convention between the United States, Great Britain, Russia and Japan for the Preservation for the Preservation and Protection of Fur Seals and Sea Otters in the North Pacific Ocean, 7 July 1911, US Treaty Series No. 564.

¹⁵ Interim Convention on Conservation of North Pacific Fur Seals, 9 February 1957, UNTS 314, 105.

¹⁶ Protocol Amending and Extending the Interim Convention on Conservation of North Pacific Fur Seals, 7 May 1976, UNTS 1082, 298.

¹⁷ See Patricia W. Birnie, International Regulation of Whaling, vol. 1 (1985), 49-70.

¹⁸ Convention for the Regulation of Whaling, 24 September 1931, LNTS 155, 349.

¹⁹ International Agreement for the Regulation of Whaling, 8 June 1937, LNTS 190, 79. See discussion in Proelss (note 4), paras. 9-11.

the United States'.²⁰ What became Art. 65 originated in a Maltese proposal made in the Sea-Bed Committee on the development of conservation for 'sea mammals'.²¹ The United States proposed to devote a separate provision to marine mammals.²² Successive versions of the relevant draft led to a 'self-standing provision'²³ which signalled that Art. 65 was going to be in addition to Art. 64, thus 'free[ing] the coastal [S]tate of challenge if it should decide to forbid exploitation of any marine mammal within its EEZ'.²⁴ Negotiations were nonetheless difficult because of polarized positions on whaling, so the resulting provision ended up being 'one of the most opaque articles in the [Convention]'.²⁵

III. Elements

1. 'marine mammals'

7 Art. 65 is marred with ambiguities to the extent that 'both proponents and opponents of whaling argue that the Convention supports their position'.²⁶ First of all, 'marine mammals' are not defined in the Convention, but the term can be understood as referring to aquatic warm-blooded and air-breathing species which are characterized by the production of milk in female mammary glands.²⁷ Many marine mammals are further characterized by the cyclic nature of their migration between breeding and feeding grounds, relatively low reproduction rate and complex social structures.²⁸ The term encompasses cetaceans, pinnipeds, sirenians, sea otters and polar bears which are all 'to a greater or lesser degree endangered species'²⁹, with cetaceans referring to whales, dolphins and porpoises more specifically.³⁰

2. 'Nothing [...] restricts the right of a coastal State [...] to prohibit, limit or regulate the exploitation'

8 As can be deduced from the fact that the text of Art. 65 omits reference to the term 'optimum utilization' (→ Art. 62 (1); Art. 64 (1)), this provision establishes a limited exception to the objective of optimum utilization by permitting coastal States to prohibit or limit the exploitation of marine mammals. In other words, coastal States are not obliged to set an allowable catch for marine mammals under Art. 61 (1) of the Convention, nor are they obliged to permit access to the allowable catch by other States in accordance with Art. 62. BIRNIE also argues that Art. 65 prevails over Art. 61 (4), in that the obligation to cooperate for the prohibition, limitation or stricter regulation of marine mammals supersedes the consideration of the effects of management measures on stocks of other species associated with or dependent upon marine mammals with a view to maintaining or restoring associated or dependent species above levels at which their reproduction may become seriously threatened.³¹ In other words, marine mammals cannot be subject to less strict regulation on the grounds that it would be necessary to maintain or restore associated or dependent species.

²⁰ Attard (note 5), 189.

²¹ Sea-Bed Committee, Malta: Preliminary Draft Articles on the Delimitation of Coastal State Jurisdiction in Ocean Space and on the Rights and Obligations of Coastal States in the Areas under Their Jurisdiction, UN Doc. A/AC.138/SC.II/L.28 (1973), 33, cited in: GAOR 28th Sess. Suppl. 21 (A/9021) vol. I, 64. See comments by Patricia W. Birnie, The Conservation and Management of Marine Mammals and Anadromous and Catadromous Species, in: Hey (note 5), 357, 370; Myron H. Nordquist/Satya N. Nandan/Shabtai Rosenne (eds.), United Nations Convention on the Law of the Sea 1982: A Commentary, vol. II (1993), 660.

²² Second Committee UNCLOS III, United States of America: Draft Articles for a Chapter on the Economic Zone and the Continental Shelf, UN Doc. A/CONF.62/C.2/L.47 (1974), 222, 224 (Article 20).

²³ L. Dolliver M. Nelson, Exclusive Economic Zone, MPEPIL, para. 62, available at: <http://www.mpepil.com>.

²⁴ Nordquist/Nandan/Rosenne (note 21), 663 (MN 65.11(a)).

²⁵ Birnie (note 3), 261.

²⁶ Cinnamon P. Carlarne, Saving the Whales in the New Millennium: International Institutions, Recent Developments and the Future of International Whaling Policies, Virginia Environmental Law Journal 24 (2005), 1, 30.

²⁷ Birnie (note 3), 264. Note that the ICRW does not define whales either, but rather refers to species listed in an Annex; Jochen Braig, Whaling, MPEPIL, para. 6, available at: <http://www.mpepil.com>.

²⁸ Proelss (note 6), paras. 1-2.

²⁹ Ibid.

³⁰ Ibid.

³¹ Birnie (note 3), 275.

3. 'States shall co-operate with a view to the conservation of marine mammals'

9 The second function of Art. 65 is to establish a duty for States to 'cooperate with a view to the conservation of marine mammals'. A special reference is made to cetaceans, in relation to which States are under an obligation to 'work through the appropriate international organizations for their conservation, management, and study'. This description suggests that such organizations play a different role than other regional fisheries management organizations set up to regulate fishing. Art. 65 does not, however, clearly establish when an international organization would be 'appropriate' for the purposes of the establishment of a distinct regime for marine mammals. It has been argued that 'it is only where the coastal [S]tate opts to delegate such jurisdiction to an international organization, that the organization becomes "appropriate" in the sense of the first sentence of article 65.'³²

10 With specific regard to the cooperation clause in the second sentence of Art. 65, the expression 'work through' is considered insufficient to determine the 'degree or means of collaboration required'.³³ It would seem that Art. 65 does not require States to become members of relevant international organizations or even to adhere to the regulations adopted by these organizations.³⁴ It has thus been argued that the obligation to 'work through' could be satisfied by mere cooperation with scientific bodies of relevant international organizations or active engagement in the organization as observers.³⁵ Canada in particular had made a declaration noting that Art. 65 does not entail an obligation to work through more than one appropriate international organization and in all events such obligation is triggered only when the status of the stock is such that the attention of the appropriate international organization is necessary to assist in the conservation, management and study of the stock.³⁶

11 Notwithstanding its limitations, this provision has been considered particularly significant for its inclusion in a comprehensive treaty, the preamble of which reflects the international community's awareness of the complex management problems concerning marine living resources and the relevance of legal developments before and after the Convention.³⁷ In addition, the lack of reference to exploitation and the emphasis on conservation could be considered apt to support the adoption of moratoria, although the specific choice of means of enforcement is left to relevant coastal States on the basis of Art. 62, and international organizations.³⁸ Several States have indeed established through national legislation sanctuaries for marine mammals in their EEZ.³⁹

4. 'in the case of cetaceans [States] shall in particular work through the appropriate international organizations for their conservation, management and study'

12 As BIRNIE emphasizes, Art. 65 cannot be understood by reference only to the drafting history of the Convention, but also of the 'more than a hundred years' of international attempts to introduce protective measures for marine mammals.⁴⁰ Successive international developments in relation to the conservation and sustainable use of marine mammals are equally relevant to interpret Art. 65.

13 One such global agreement is certainly the ICRW which applies to all waters in which whaling is undertaken,⁴¹ thus also to the EEZ.⁴² While the ICRW was conceived as a treaty for the preservation of whale stocks to ensure the continuation of the whaling industry,⁴³ it led to the adoption of the so-

³² *McDorman* (note 8), 182.

³³ *Birnie* (note 21), 370.

³⁴ *Proelss* (note 6), para. 14.

³⁵ *Braig* (note 27), para. 41; *McDorman* (note 8), 182-187.

³⁶ *McDorman* (note 8), 183.

³⁷ *Birnie* (note 3), 262.

³⁸ *Id.* (note 21), 370-371.

³⁹ See examples discussed in *Robin R. Churchill/Alan V. Lowe*, *The Law of the Sea* (3rd edn. 1999), 318-319.

⁴⁰ *Birnie* (note 3), 261.

⁴¹ Art. I ICRW.

⁴² The ICRW itself is conceived as setting minimum standards and therefore States may adopt and enforce laws or regulations within their jurisdiction which give additional protection to whales provided they are not inconsistent with the provisions of the ICRW; see International Whaling Conference, Report of the Drafting Committee at the International Whaling Conference, Doc. IWC/49 (1946).

⁴³ *Braig* (note 27).

called moratorium on commercial whaling in 1982,⁴⁴ following a recommendation adopted at the Stockholm Conference on the Human Environment.⁴⁵ The moratorium is still in place, although parties to the ICRW continue to debate whether the Convention has become a conservation rather than a sustainable use instrument: parties have established whale sanctuaries⁴⁶ and adopted non-binding recommendations on conservation issues such as the impacts of climate change on whales and trade in whale products, but also adopted a Revised Management Procedure in 1994 with a view to resuming commercial whaling in the future once the accompanying revised management scheme on enforcement is completed.⁴⁷ As a result of polarized views on the ultimate aim of this convention⁴⁸, the International Whaling Commission's activity has resulted in periodic meetings in which 'rival groups [of States] agree to disagree on crucial issues'.⁴⁹

14 Notably, UNCLOS does not refer explicitly to the International Whaling Commission (IWC), the only international organization related to marine mammals that was in existence at the time of its negotiation. This omission, and the reference to international organizations in plural, implicitly recognizes the dissatisfaction with the IWC's activities to conserve marine mammals and leaves the door open for the application of other international instruments.⁵⁰ Other relevant institutions in fact include the UN Environment Programme, with its regional seas conventions, and the Food and Agriculture Organization of the United Nations, as well as other international organizations that address activities that negatively impact on marine mammals, such as land-based sources of marine pollution.⁵¹

15 One global international regulatory instrument is the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),⁵² which currently lists all whale species in its Appendix I, reflecting the IWC moratorium on commercial whaling⁵³ as well as in recognition of the fact that 'international trade in whale meat and other products [otherwise lacks] adequate international monitoring or control'.⁵⁴ In further acknowledgement that any illegal trade in whale products undermines the effectiveness of both CITES and the IWC, CITES parties also authorized the Secretariat to exchange information and consult with the IWC on all proposals to list or delist cetaceans from its Appendices.⁵⁵

⁴⁴ Paragraph 10 (e) of the Schedule to the ICRW provides that 'catch limits for the killing for commercial purposes of whales from all stocks for the 1986 coastal and the 1985/86 pelagic seasons and thereafter shall be zero. This provision will be kept under review, based upon the best scientific advice, and by 1990 at the latest the Commission will undertake a comprehensive assessment of the effects of this decision on whales stocks and consider the modification of this provision and the establishment of other catch limits'.

⁴⁵ UNCHE, Report of the United Nations Conference on the Human Environment, UN Doc. A/CONF.48/14/REV. 1 (1973), 6 (Action Plan for the Human Environment).

⁴⁶ Sanctuaries have been adopted in the Indian Ocean and the Southern Ocean; see ICRW, Schedule, para. 7. Several IWC members are also proposing the establishment of a third sanctuary in the South Atlantic Ocean and the proposal will be discussed at the 2016 meeting of the IWC. Note that the legality of the establishment of sanctuaries under the ICRW is contested: *Elisa Morgera*, *Whale Sanctuaries: An Evolving Concept within the International Whaling Commission*, ODIL 35 (2004), 319.

⁴⁷ *Proelss* (note 6), paras. 15-17, refers to the revised management scheme as 'widely considered as one of the most rigorous and conservative management schemes for living marine resources ever developed'; while *Carlarne* (note 26), 14-21 notes criticism for its inadequate ecosystem approach.

⁴⁸ See ICJ, *Case concerning Whaling in the Antarctic* (Australia v Japan; New Zealand Intervening), Merits, Judgment of 31 March 2014, ICJ Reports (2014), 226, para. 56, where the Court highlighted that 'amendments to the Schedule and recommendations by the IWC may put an emphasis on one or other objective pursued by the Convention, but cannot alter its object and purpose.'

⁴⁹ *Birnie* (note 3), 275.

⁵⁰ *Ibid.*

⁵¹ *Ibid.*, 265, 272.

⁵² *Erik Franckx*, *The Protection of Biodiversity and Fisheries Management: Issues Raised by the Relationship between CITES and LOSC*, in: David Freestone *et al.* (eds.), *The Law of the Sea: Progress and Prospects* (2006), 210.

⁵³ *Birnie* (note 3), 276; *Proelss* (note 6), para. 18; *Alexander Gillespie*, *Whaling Diplomacy* (2005), 337-338. Although attempts have been made to down-list certain whale species, these have been so far unsuccessful, *ibid.*, 338-345.

⁵⁴ COP CITES, *Illegal Trade in Whale Meat*, Resolution Conf. 9.12 (CoP9) (1994); see comments by *Gillespie* (note 53), 328.

⁵⁵ COP CITES, *Conservation of Cetaceans, Trade in Cetacean Specimens and the Relationship with the International Whaling Commission*, Resolution Conf. 11.4 (Rev. CoP 12) (2000); see also *Gillespie* (note 53), 328, who also reports on IWC resolutions on trade in whale products before and after the adoption of CITES; *Carlarne* (note 26), 22-28.

16 Several regional arrangements should also be regarded as relevant for the purposes of Art. 65. First of all, certain whaling countries (Norway, Iceland, Greenland and the Faroe Islands) established the Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic, which established the North Atlantic Marine Mammal Commission with the objective to contribute through regional consultation and cooperation to the conservation, rational management and study of marine mammals in the North Atlantic.⁵⁶ While this organization is largely seen as an alternative forum to the IWC, it has so far not functioned as a regulatory body but only as a forum for data collection.⁵⁷

17 The Convention on the Conservation of Migratory Species of Wild Animals (CMS) is also a salient international framework that has focused on marine mammals, listing several cetaceans in its appendices, and having become ‘the foremost international body’ for the conservation of small cetaceans in particular.⁵⁸ In addition, a series of regional conservation agreements have been developed in the framework of CMS, such as the Agreement on the Conservation of Cetaceans of the Black Sea, Mediterranean Sea and Contiguous Atlantic Area (ACCOBAMS), the Agreement on the Conservation of Small Cetaceans of the Baltic and North Seas, the Agreement on the Conservation of Seals in the Wadden Sea, the Memorandum of Understanding on the Conservation and Management of Dugongs and their Habitats throughout their Range⁵⁹, the Memorandum of Understanding concerning Conservation Measures for the Eastern Atlantic Populations of the Mediterranean Monk Seal,⁶⁰ and the Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region⁶¹. These agreements have been considered pure conservation treaties, being based on the precautionary approach and having led to the adoption of comprehensive conservation and management plans.⁶² Notably these agreements recognize in their preambles ‘the importance of other global and regional instruments [...] such as the [ICRW]’.⁶³ In 2011 CMS parties adopted a Global Programme of Work for Cetaceans,⁶⁴ including global collaborative action to address entanglement and by-catch and climate change as a high priority; ship strikes, pollution, marine noise and habitat and feeding ground degradation as a lower priority; as well as the development of a formal process within CMS for providing comments to CITES on proposals to amend the latter’s Appendices and to seek comments from CITES on proposals to amend the CMS Appendices.⁶⁵

18 Other relevant agreements include the 1998 Agreement on the International Dolphin Conservation Programme,⁶⁶ which aims to progressively reduce the incidental dolphin mortalities in tuna purse-seine fishery to levels approaching zero through the setting of annual limits and the long-term sustainability of the tuna stocks in the Agreement area. Its implementation is being coordinated by the ICCAT. Another prominent instrument is the 1999 Agreement between France, Italy and Monaco establishing the Ligurian Sea Sanctuary in the Mediterranean Sea establishing an area within which killing, attempt to taking and harassment of cetaceans (including small cetaceans) is prohibited, as well as providing an innovative framework to regulate habitat preservation (in terms of prevention

⁵⁶ Art. 2 Agreement on Cooperation in Research, Conservation and Management of Marine Mammals in the North Atlantic.

⁵⁷ *Proelss* (note 6), paras. 19-20; *Carlarne* (note 26), 29.

⁵⁸ *Gillespie* (note 53), 333.

⁵⁹ UNEP/CMS, Memorandum of Understanding on the Conservation and Management of Dugongs and their Habitats throughout Their Range, 31 October 2007, available at: http://www.cms.int/species/dugong/pdf/Annex_08_Dugong_MoU.pdf.

⁶⁰ UNEP/CMS, Memorandum of Understanding Concerning Conservation Measures for the Eastern Atlantic Populations of the Mediterranean Monk Seal (*Monachus Monachus*), 18 October 2007, available at: http://www.cms.int/species/monk_seal/Monk_Seal_MoU_with_signatures_En.pdf.

⁶¹ UNEP/CMS, Memorandum of Understanding for the Conservation of Cetaceans and Their Habitats in the Pacific Islands Region, 9 September 2006, available at: http://www.cms.int/species/pacific_cet/_CMS_Pacific_Cetaceans_MoU_E_amended.pdf.

⁶² *Proelss* (note 6), para. 23. For other relevant agreements, see *ibid.*, paras. 25-26.

⁶³ E.g., Recital 11 Preamble ACCOBAMS. This reflects the conflict clause in Art. XII (2) CMS, *Gillespie* (note 53), 332.

⁶⁴ COP CMS, Global Programme of Work for Cetaceans, UN Doc. UNEP/CMS/Resolution 1.15 (2011).

⁶⁵ *Ibid.*

⁶⁶ Agreement on the International Dolphin Conservation Program, 15 May 1998, available at: <http://iatcc.org/PDFFiles2/AIDCP-amended-Oct-2009.pdf>. It was adopted by the 35th Intergovernmental Meeting on the Conservation of Tunas and Dolphins in the Eastern Pacific Ocean; the Secretariat is hosted in Inter-American Tropical Tuna Commission (ICCAT).

of pollution and restriction to navigation), fishing techniques, scientific research, whale-watching, and education activities.⁶⁷

19 Some States have also unilaterally addressed this issue by banning imports of fish caught using techniques which may be harmful to marine mammals. However, such action has sometimes been challenged as a violation of international trade rules.⁶⁸ The most recent of these cases concerned a United States measure designed to promote the conservation of dolphins by imposing strict conditions for the use of a ‘dolphin-safe’ label on tuna products imported into the United States. In response to a challenge by Mexico, the Appellate Body of the World Trade Organization found there was a violation of the non-discrimination provision in the Agreement on Technical Barriers to Trade because tuna caught in the Eastern Tropical Pacific had to meet more stringent conditions in order to be labeled ‘dolphin-friendly’ compared with tuna caught in other parts of the world.⁶⁹ At the same time, the Appellate Body confirmed that the Agreement on Technical Barriers to Trade allowed the United States to adopt a unilateral standard which was stricter than the standards contained in the 1998 Agreement on the International Dolphin Conservation Programme to which it was a party.⁷⁰

20 It can be concluded that Art. 65 is ‘a framework’ provision the implementation of which is dependent on more specific regional and global agreements.⁷¹ Its merit has been allowing, if not encouraging, continued debate on marine mammals regulation in a variety of international fora⁷² and to some extent also their cooperation.⁷³

⁶⁷ L’Accord relatif à la création en Méditerranée d’un Sanctuaire pour le Mammifères Marins, 25 November 1999 (original languages are French and Italian), available at: http://www.oceanlaw.net/texts/sanctuary_fr.htm For a legal analysis of the treaty, see *Tullio Scovazzi*, The Mediterranean Marine Mammals Sanctuary, IJML 16 (2001), 132.

⁶⁸ See e.g. GATT Panel Report, *US – Restrictions on Imports of Tuna*, DS21/R, 3 September 1991, unadopted, BISD 39S/155.

⁶⁹ Report of the WTO Appellate Body, *US – Measures concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, 16 May 2012, para. 297: ‘the United States has not demonstrated that the difference in labeling conditions for tuna products containing tuna caught by setting on dolphins in the ETP, on the one hand, and for tuna products containing tuna caught by other fishing methods outside the ETP, on the other hand, is ‘calibrated’ to the risks to dolphins arising from difference fishing methods in different areas of the ocean’.

⁷⁰ *Ibid.*, para. 401.

⁷¹ *Proelss* (note 6), para. 14.

⁷² *Birnie* (note 3), 266.

⁷³ E.g., the above-mentioned cooperation between CITES and the IWC and also the, IWC, Memorandum of Understanding between the Secretariat of the IWC and the Secretariat of the CMS, Appendix 2, IWC 52nd Meeting Report (2001), where the two bodies ‘to the extent possible, coordinate their programme of activities to ensure that their implementation is complementary and mutually supportive’, *Gillespie* (note 53), 332-337.

